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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 231

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHICAGO RAILWAY EQUIPMENT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 27, 1930
CERTIORARI GRANTED OCTOBER 13, 1930

SUPREME COURT OF THE UNITED STATES

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1 Before U. S. Board of Tax Appeals

Docket No. 3964

CHICAGO RAILWAY EQUIPMENT CO., 1928 WEST 46TH STREET, CHICAGO, ILL., PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

For taxpayer: W. S. Oppenheim, Esq.; Henry W. Price, Esq.; John C. Gall, Esq.

For commissioner: L. C. Mitchell, Esq.; Percy S. Crewe, Esq.; W. F. Gibbs, Esq.; R. W. Wilson, Esq.

Littleton—Member.

Docket entries

1925

May 6—Petition received and filed.

May 9—Copy of petition served on solicitor.

May 9—Notification of receipt mailed taxpayer.

May 29—Motion to strike filed by solicitor.

June 18—Order setting date for hearing on motion as July 2, signed and filed. Both sides notified.

July 2—Hearing had—Div. 2—on motion to strike certain parts of petition—Motion granted—Taxpayer allowed until 7-22-25 to file amended petition, and comm'r given twenty days to answer.

July 2—Order granting commissioner's motion—Amended petition due 7-22-25 and commissioner's answer due twenty days after service, signed and filed, both sides notified.

July 20—Amended petition filed by taxpayer.

July 21—Copy of amended petition served on solicitor—Notification mailed taxpayer.

Aug. 8—Answer to amended petition filed by solicitor.

Aug. 15—Copy of answer served on taxpayer—Assigned to 12-15-25.

Nov. 5—Hearing date changed to 2-2-26.

2 Nov. 25—Deposition filed. Copy served. (Cannato, Sullivan, Leigh).

Nov. 27—Copy of depositions of Cannata, Sullivan, and Liegh served on solicitor.

Dec. 19—Motion to amend with amendment filed by taxpayer.

Dec. 28—Granted. Both sides notified.

Dec. 31—Copy of motion and amended petition served on solicitor. Taxpayer notified.

1926

Jan. 26—Answer to amended petition filed by solicitor.

Jan. 30—Copy of answer served on taxpayer.

Feb. 2—Hearing had—Div. 2—on merits. Both parties briefs (no exchange) and findings due 3–19–26—Appeal submitted.

Feb. 23—Transcript filed (2–2–26).

Mar. 2—Brief & findings filed by solictor.

Mar. 15—Brief and findings filed by taxpayer.

July 28—Findings of fact and opinion rendered (Littleton). Order of redetermination will be entered on 15 days' notice. Both sides notified.

Aug. 16—Petition for rehearing filed by taxpayer.

Sept. 4—Order denying motion for rehearing signed and filed. Both sides notified.

Oct. 12—Notice of settlement filed by G. C.

Oct. 16—Notice allowing taxpayer until 11–2–26 to file alternative settlement for hearing 11–18–26—upon failure to do so, hearing set for 11–4–26.

Nov. 4—Hearing had before Mr. Littleton on settlement—Submitted.

Nov. 4—Order of redetermination—signed and filed. Both sides notified.

Nov. 10—Ordered that above order be modified for 1918, showing deficiency. Signed and filed. Both sides notified.

Dec. 20—Agreement for security for payment of tax approved and filed.

Dec. 27—Original writ of error and copy received & said copy filed of record.

Dec. 27—Praecipe filed by taxpayer.

Dec. 27—Bill of exceptions approved & filed.

Dec. 8—Notice re settlement of bill of exceptions filed by taxpayer.

1927

Jan. 19—Transcript sur original writ of error, citation & bill of exceptions fowarded clerk of 7th Cir. Ct. of Appeals.

Oct. 8—Mandate from U. S. Ct. of Appeals 7th Cir. reversing board's decision and remanding proceedings for further consideration filed.

Oct. 10—Motion to redocket, to set aside decision of Nov. 10, 1926 & to return to petitioner receipt acknowledging deposit of $125,000.00 filed by taxpayer. Copy served on G. C. 10–12–27.

Oct. 10—Order reinstating proceeding upon the docket & placing upon Day Cal. of 1–23–28, signed & filed. Both sides notified.

Oct. 11—Hearing date set 10–18–27, on motion.

Oct. 18—Hearing had before Mr. Smith on petitioner's motion of 10–10–27—Granted.

Order 20—Order granting motion and that docket 18438 be and the same set for hearing be heard together with 3964, 1–23–28, signed and filed. Both sides notified.

Oct. 26—Transcript of hearing 10–18–27 filed.

Nov. 12—Memo. and order denying motion for cancellation of bond. Signed and filed. Both sides notified.

Dec. 13—Notice to produce filed by taxpayer. (1)

Dec. 13—Proof of service filed by G. C.

Dec. 30—Motion for leave to file supplemental petition filed by taxpayer. Amendment tendered.

1928

Jan. 16—Ordered proceeding be placed on day cal. of 3–22–28 and motion to file supplemental petition granted—45 days from date to answer, entered.

Jan. 20—Copy of motion and supplemental petition served on G. C.

Feb. 20—Answer to supplemental petition filed by G. C. Copy served 2–25–28.

Mar. 22—Hearing had before Mr. Smith on merits. Consolidated with 18438—Briefs due in 60 days.

Mar. 28—Transcript of hearing, 3–22–28, filed.

May 17—Brief filed by taxpayer. (20)

May 21—Brief filed by G. C.

Sept. 24—Findings of fact and opinion rendered. Judgment will be entered under rule 50.

4 1929

Jan. 14—Notice of settlement filed by G. C.

Jan. 17—Hearing set 2–13–29 on settlement.

Feb. 9—Objections to settlement and recomputation filed by taxpayer.

Feb. 14—Transcript of hearing 2–13–29, filed.

Feb. 13—Hearing had before Mr. Smith on settlement.

Feb. 21—Order of redetermination entered.

May 8—Petition for review by U. S. Cir. Ct. of Ap. (7) with assignments of error filed by taxpayer.

May 8—Proof of service filed.

May 9—Notice of appearance of John C. Gall as counsel for taxpayer, filed.

May 9—Statement of evidence lodged.

May 9—Proof of service of statement for hearing May 28, 1929, filed.

May 28—Statement of evidence approved and ordered filed.

May 28—Hearing had before Mr. Smith on approval of statement of evidence, approved.

June 25—Agreement for security for payment of tax approved and ordered filed. See 18438.

July 6—Order enlarging time to Aug. 6, 1929, for filing certified copies of record, entered.

Now, July 23, 1929, the foregoing docket entries certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

5 Before U. S. Board of Tax Appeals

Second amended petition

Filed December 19, 1925

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (Symbols IT:CR:D-60, D-ATS) dated March 14th, 1925, and as the basis of its appeal sets forth the following:

I

The taxpayer is an Illinois corporation with principal office at 1928 West 46th Street, Chicago, Illinois.

II

The deficiency letter, copy of which is hereto attached, was mailed to the taxpayer on March 14, 1925.

III

The taxes in controversy are income and profits taxes for the calendar years 1917, 1918, 1919, and are more than $10,000.00 to wit: $123,763.35.

IV

The determination of tax contained in the said deficiency letter is based upon the following errors:

(1) The commissioner has used erroneous values for depreciation purposes.

(2) The commissioner has allowed insufficient depreciation.

(3) The commissioner has denied deductions for bad debts ascertained to be worthless and written off within the taxable year.

6 V

The facts upon which the taxpayer relies as the basis of its appeal are as follows:

(1) The properties of the taxpayer upon which the commissioner has refused to allow the amount for depreciation asked for by the taxpayer consist of six plants owned by the taxpayer, and that all of said plants are of brick and concrete construction, save one at Franklin, Pennsylvania, which is of steel and corrugated

iron; that the fair market value of said several brick and concrete buildings on the first day of March, 1913, was $533,806.64 and that the cost of subsequent additions made thereto, prior to December 31, 1916, was $36,191.81; that the additions made in 1917 cost $20,588.66; in 1918, $26,584.15, and in 1919, $19,429.98; that the fair market value of that part of the steel and corrugated iron structure which survived the fire in 1914 and is still used by the taxpayer was, on the 1st day of March, 1913, $45,276.48, and that the taxpayer subsequently and prior to December 31, 1916, made additions thereto at the cost and of the value of $98,964.19.

(2) That the fair market value of the taxpayer's power plant, on the first day of March, 1913, was $83,608.45 and that the taxpayer, subsequently and prior to December 31, 1916, made additions thereto at the cost and of a value of $18,172.16.

(3) That the fair market value of the taxpayer's tools and machinery on the 1st day of March, 1913, was $681,895.32 and that the taxpayer made subsequent additions thereto, prior to December 31, 1916, at a cost and of a value of $99,127.48, and during the year 1917 taxpayer expended a further sum of $33,938.34 and in the year 1919, the sum of $12,821.16 for additional tools and machinery.

(4) That the commissioner, in arriving at the depreciation allowance for the years 1917, 1918, and 1919, has disregarded above values and has erroneously fixed the value of all of the taxpayer's buildings on the 31st day of December, 1916 at $547,824.17, not separating the brick and concrete buildings from the steel and corrugated iron building which should bear, as taxpayer is informed, a five per cent depreciation instead of a three per cent depreciation, and has erroneously fixed the value of the additions to all of said buildings in 1919 as $9,199.17, instead of $19,429.28.

7 (5) That the commission, in arriving at the depreciation allowance for the years 1917, 1918, and 1919, has disregarded the true value of the taxpayer's power plant and has fixed the value thereof for the years 1917, 1918, and 1919, at $355,054.06 instead of $101,780.61, by improperly, as taxpayer charges and believes, transferring the sum of $253,272.45 from the tool and machinery account, which bears a 10 per cent depreciation, to the power plant account, which bears a 5 per cent depreciation.

(6) That the commissioner, in arriving at the depreciation allowance for the years 1917, 1918 and 1919, has erroneously fixed the value of the taxpayer's tools and machinery on the 31st day of December, 1916, at $416,330.49, whereas the value of said tools and machinery on December 31, 1916, was $781,022.80, to which additions were made as above stated.

(7) That the taxpayer during the war years turned out large quantities of railway equipment and munitions under pressure from the War Industries Board. This output had to be turned out regardless of expense and the strain upon the manufacturing facilities materially increased the normal depreciation upon such facilities.

(8) That the taxpayer in 1918 wrote off certain accounts that from the best information obtainable at the time were judged to be worthless. Small recoveries were made on some of these accounts, and the commissioner erroneously charged back and restored to the taxable income for the year 1918 the sum of $40,101.67 and refused to allow the same as a deduction.

(9) That the commissioner erroneously charged back and restored to the taxable income for the year 1919 the sum of $25,061.58 on account of bad debts charged off by the taxpayer in the year 1918 and refused to allow the same as a deduction.

(10) That the commissioner, in arriving at the amount of invested capital of the taxpayer for the year 1917, erroneously reduced the same to the sum of $4,796,997.12 by deducting the sum of $15,641.55, which was the Federal income tax levied against the taxpayer for the year 1916 and paid in the year 1917, whereas the correct amount of invested capital of the taxpayer for the year 1917, as taxpayer is informed and believes, should have been fixed at $4,612,638.67.

(11) That the commissioner, in arriving at the amount of invested
capital of the taxpayer for the year 1918, erroneously reduced
8 the same to the sum of $5,452,299.98 by deducting the Federal
income tax of 1917 of $91,386.67 and an additional Federal income tax of 1916 amounting to $2,880.76, which were paid by the taxpayer, whereas the correct amount of invested capital of the taxpayer for the year 1918, as taxpayer is informed and believes, should have been fixed at the sum of $5,546,567.41.

(12) That the commissioner, in arriving at the amount of invested capital of the taxpayer for the year 1919, erroneously reduced the same to $5,796,994.30 by deducting an additional income tax of the taxpayer for the years 1916 and 1917 in the sum of $27,794.03 and the 1918 federal income tax of the taxpayer pro rated to the amount of $90,476.55, whereas the correct amount of invested capital of the taxpayer for the year 1919, as taxpayer is informed and believes, should have been fixed at $5,915,264.88.

VI

The taxpayer in support of its appeal relies upon the following propositions of law:—

(1) The taxpayer should be given a reasonable allowance for exhaustion, wear and tear of property based on values of March 1, 1913, for such property acquired prior to that date, with additions made thereto.

(2) The taxpayer should be allowed to charge off bad debts ascertained to be worthless within the taxable year.

(3) The invested capital of the taxpayer should not have been reduced by deducting therefrom the Federal Income Taxes levied against it for the preceding years.

Wherefore the taxpayer respectfully prays that this Board may hear and determine its appeal.

William S. Oppenheim,
Counsel for Taxpayer,
905 First National Bank Building, Chicago, Illinois.

[*Duly sworn to by Edward T. Walker; jurat omitted in printing.*]

---

9 Copy

Treasury Department

Washington, *March 14, 1925.*

IT: CR: D—60 D.
ATS.

Chicago Railway Equipment Company,
1928 West 46th Street, Chicago, Illinois.

Sirs: An examination of your income tax returns, and those of your affiliated companies, together with the information theretofore submitted, has been made for the years 1917, 1918, and 1919, and the result thereof is shown on the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement con-
10 senting to the assessment of the deficiency and forward it to
the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT: CR: D—60 D—ATS. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. Blair,
Commissioner.
By J. G. Bright,
Deputy Commissioner.

Inclosures:
Statements.
Agreement—Form A.

Statement of returns examined and resulting tax liability

RETURNS EXAMINED

Company	Year	Returns
Chicago Railway Equipment Co., Chicago, Illinois	1917	1103-1031.
" " " " " "	1917	Amended 1031 consolidated.
" " " " " "	1918	1120.
" " " " " "	1918	Amended 1120 consolidated.
" " " " " "	1919	1120.
" " " " " "	1919	Amended 1120 consolidated.

TAX LIABILITY

Company	Year	Additional tax
Chicago Railway Equipment Co., Chicago, Illinois	1917	$22,337.85
	1918	85,815.59
	1919	15,609.91
Total additional taxes		123,763.35

The adjustments producing the above stated results are shown in detail on schedules 1 to 21, inclusive, attached to bureau letter dated August 20, 1924.

The statements made in your briefs dated February 24, 1922, August 11, 1922, November 16, 1922, and briefs sworn to under dates February 26 and September 5, 1924, have had careful consideration, as has also your letter of January 9, 1925, protesting the unit's presentation of your case to the committee.

11 The action of the unit in disallowing appreciation of plant assets entered prior to 1915, in establishing values subject to depreciation, has been sustained.

Waivers properly executed for the years 1917, 1918, and 1919, consenting to the assessment of the additional taxes as shown above, are on file in this office.

This letter supersedes the bureau letter dated August 20, 1924.

Treasury Department

Washington, *Aug. 20, 1924.*

IT: CR: D
EFN

Chicago Railway Equipment Company,
128 West 46th Street, Chicago, Ill.

Sirs; An examination of your income tax returns and of your books of account and records together with the information heretofore submitted for the years 1917, 1918, and 1919 discloses an additional tax liability aggregating $123,763.35, as shown in detail in the attached statement and schedules 1 to 21, inclusive.

You are granted 30 days from the date of this letter within which to present a protest, supported by additional evidence or brief, against this determination of a deficiency. Upon request submitted within the period mentioned, you will also be granted a hearing in the bureau with reference to the matter. A request for a hearing should contain (a) the name and address of the taxpayer; (b) in the case of a corporation, the name of the State of incorporation; (c) a designation by date and symbol of the notice or notices with respect to which the hearing is desired; (d) a designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings of the unit to which the taxpayer takes exception; and (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception.

If, after consideration of any additional evidence submitted and
any arguments advanced by you, a deficiency is finally determined
by the bureau to be due from you, you will, in accordance with
the provisions of section 274 of the revenue act of 1924, be
12 advised by registered mail of the final determination of the
Commissioner as to the amount of the deficiency, and al-
lowed 60 days from the mailing of the letter in which to file an
appeal to the Board of Tax Appeals in the event you do not acquiesce
in such final determination.

If you acquiesce in the determination of a deficiency as disclosed in this letter and the accompanying statements, you are requested to sign the enclosed agreement consenting to the assessment of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CR:D—EFN. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

C. B. Allen,
Acting Deputy Commissioner.

Enclosures:
Statements.
Agreement—Form A.
Schedules 1 to 21 incl.

IT:CR:D
EFN

Statement of returns examined and resulting tax liability

RETURNS EXAMINED

Company	Year	Returns
Chicago Railway Equipment Co., Chicago, Illinois	1917	
" " " " " "	1917	Amended 1031 consolidated.
" " " " " "	1918	1120.
" " " " " "	1918	Amended 1120 consolidated.
" " " " " "	1919	1120.
" " " " " "	1919	Amended 1120 consolidated.

Statement of returns examined and resulting tax liability—Con.

TAX LIABILITY

Company	Year	Additional tax
Chicago Railway Equipment Co., Chicago, Illinois	1917 1918 1919	$22,337.85 85,815.59 15,609.91
Total additional taxes		123,763.35

13 The adjustments producing the above-stated results are in accordance with the recommendation of the committee on appeals and review dated May 6, 1924, a copy of which was sent your representatives, Price, Waterhouse and Company, Transportation Building, Washington, D. C., under date of May 12, 1924.

The statements made in your briefs dated February 24, 1922, August 11, 1922, and November 16, 1922, have had careful consideration.

The revenue agent's report dated January 27, 1921, has been made the basis of the adjustments contained in schedules 1 to 21, inclusive, attached hereto.

Duly executed waivers consenting to the assessment of additional taxes for the years 1917 and 1918 are on file in this office.

This letter supersedes bureau letter dated October 25, 1923.

Chicago Railway Equipment Company

Year ended Dec. 31, 1917

Schedule 1

Net income as disclosed by revenue agent's report	$896,127.83
As corrected	895,905.03
Net deductions	222.80
Addition: (A) Adjustment of depreciation	578.70
Deduction: (B) Special claim reserve	801.50
Net deductions as above	222.80

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Schedule 2

Explanation of items changed

(a) Depreciation adjustment:

Allowance of deduction from gross income on account of depreciation sustained has been adjusted in accordance with the recommendations of the Committee on Appeals and Review, which have been approved by the Commissioner.

Details of the computation of depreciation sustained are shown by Exhibit A attached hereto and made part hereof.

Depreciation allowed by revenue agent	$82,693.20
Depreciation sustained in 1917 Exhibit A	82,114.50
Difference restored to income	578.70

(b) Your explanations of this item as contained in your brief dated February 24, and August 11, 1922, has been accepted and the amount of your taxable income reduced by the amount of increase in this reserve.

Schedule 3

Invested capital

Invested capital disclosed by revenue agent's report		$4, 736, 590. 84
As corrected		4, 796, 997. 12
Net additions as explained below		60, 406. 28
Additions: (a) Adjustment of appreciation	$107, 823. 77	
Total additions		107, 823. 77
Reductions:		
(b) Adjustments of depreciation reserve	39, 246. 80	
(c) Adjustment of 1916 income tax	7, 125. 59	
(d) Special claims reserve	1, 045. 10	
Total reductions		47, 417. 49
Net additions as above		60, 406. 28

15

Schedule 4

Explanations of items changed

(a) Deduction from surplus on account of appreciation of assets as shown by revenue agent's report	$368, 277. 72
Appreciation credited to surplus as shown by your brief dated February 26, 1924	260, 453. 95
Difference restored to invested capital	107, 823. 77
(b) Depreciation reserve as shown by your books	656, 366. 00
Depreciation reserve as adjusted and shown by revenue agent's report	617, 119. 80
Difference deducted	39, 246. 90

This adjustment has been made in accordance with your appeal.

(c) Your books are kept on an accrual basis; therefore the income tax payable for the year 1916 is considered an accrued tax liability on Dec. 31, 1916:

Income tax for 1916	15, 641. 55
Amount deducted by revenue agent	8, 515. 96
Balance, additional deduction	7, 125. 59

This adjustment has been made in accordance with Treasury Decision 2433.

(d) It is contended in your brief dated February 24 and August 11, 1922, that the item "Special claims reserve" is a liability, the amount thereof allowed by the revenue agent as part of invested capital is therefore deducted.

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Schedule 5

Proof of invested capital

Capital stock		$2, 486, 000. 00
Surplus		1, 356, 082. 60
Reserves—Contingencies		10, 000. 00
Inventory fluctuation		143, 020. 83
Sales reserve, Marion		1, 500. 00
" " Grand Rapids		1, 500. 00
Total, corrected balance sheet beginning of year		3, 998, 103. 43
Additions—Good will restored		3, 044, 020. 89
Improvements charged to expense		668. 30
Total		7, 042, 792. 62
Reductions:		
Good-will limitation	$1, 949, 700. 00	
Appreciation credited to surplus	280, 453. 95	
1916 Federal income tax	15, 641. 55	
Total (deduct from above)		2, 245, 795. 50
As shown on schedule No. 3		4, 796, 997. 12

Schedule 6

Computation of excess-profits tax

Invested capital (schedule 3)	$4, 796, 997. 12
Net income (schedule 1)	895, 905. 03

	Income	Tax
Deduction, 7%, $335,789.80, plus $3,000.00	$338, 789. 80	
Taxable at 20%	380, 759. 76	$76, 151. 95
25%	176, 355. 47	44, 088. 87
	895, 905. 03	120, 240. 82

17

Schedule 7

Computation of tax, 1917 total tax

	Income	Tax
Taxable net income, schedule 1	$895, 905. 03	
Deduct excess profits tax, schedule 4	120, 240. 82	$120, 240. 82
Taxable at 2 per cent	775, 664. 21	15, 513. 28
Taxable at 4 per cent	775, 664. 21	31, 026. 57
Total tax liability		166, 780. 67
Previously assessed:		
Ogiginal return	141, 867. 40	
Amended return	2, 575. 42	144, 442. 82
Additional tax to be assessed		22, 337. 85

Schedule 8

Net income

Net income as disclosed by revenue agent's report		$732, 466. 75
As corrected		729, 672. 15
Net deductions		2, 794. 60
Additions: (a) Additional bad debts disallowed	$9, 659. 27	
Total additions		9, 659. 27
Deductions:		
(b) Adjustment of depreciation deduction	$832. 27	
(c) Special claims reserve	11, 621. 60	
Total deductions		12, 453. 87
Net deductions as above		2, 794. 60

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Schedule 9

Explanation of items changed

(a) Adjustment of bad debts:	
Bad debts not allowable as deduction in 1918 according to detailed statement of items 1 to 9, inclusive, as shown in "Memorandum of transmittal" dated Jan. 29, 1924	$41, 403. 91
Union Truck Company (item 5) allowed by committee	1, 302. 24
Balance not allowable as deduction in 1918	40, 101. 67
Amount disallowed by revenue agent	30, 442. 40
Balance disallowed and restored to taxable income	9, 659. 27
(b) Depreciation sustained during year (Exhibit A)	85, 441. 03
Depreciation allowed by revenue agent	84, 608. 76
Additional amount allowed	832. 27
(c) Additions to "Special claims reserve," treated by revenue agents as allocation of surplus but considered by your briefs as a liability, is allowed as deduction from income.	

19

Schedule 10

Invested capital

Invested capital disclosed by revenue agent's report		**$5, 384, 285. 96**
As corrected		**5, 452, 299. 98**
Net additions as explained below		**68, 014. 02**
Additions:		
(a) Adjustment of appreciation	**$107, 823. 77**	
(b) Adjustment 1917 tax proration	**704. 95**	
Total additions		**108, 528. 72**
Reductions:		
(c) Special claims reserve	**1, 846. 60**	
(d) Adjustment of depreciation reserve	**38, 668. 10**	
Total reductions		**40, 514. 70**
Net additions as above		**$68, 014. 02**

Schedule 11

Explanation of items changed

(a) For explanation, see schedule 4.	
(b) Proration of income and profits tax, 1917:	
1917 adjusted as shown on schedule 7	$166,780.67
Deduction $166,780.65×200/365 equals	91,386.67
Deduction by revenue agent	92,091.62
Difference restored to invested capital	704.95
(c) For explanation, see schedule 4, item (d).	
(d) Adjustment of depreciation reserve as shown by schedule 4, item (b)	39,246.80
Deduct adjustment of depreciation allowance in 1917 as shown by schedule 1	578.70
Balance deducted in 1918 adjustment	38,668.10

20

Schedule 12

Proof of invested capital

Capital stock		$2,486,000.00
Surplus		4,760,154.61
Reserve:		
Contingencies		10,000.00
Inventory		143,020.83
Sales, Marion		2,500.00
" Grand Rapids		2,608.63
Total, corrected balance sheet beginning of year		7,404,284.07
Additions:		
Adjustment of appreciation		107,823.77
Additional capital stock sold		6,481.37
Depreciation adjustment 1917 income		578.70
Total		7,519,167.91
Brought forward—Total		7,519,167.91
Reductions:		
Good Will limitation	$1,825,400.00	
Depreciation Reserve Adjustment	39,246.60	
1917 Income Tax	91,386.67	
Additional income tax 1916	2,880.76	
Dividends paid pro rated	107,953.70	
Total (deduct from above)		2,066,867.93
As shown on schedule No. 10		5,452,299.98

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Schedule 13

Computation of excess profits and war profits credits

Net income taxable year (Schedule 8)	$729,672.15
Invested capital taxable year (Schedule 10)	5,452,299.98
Excess profits credit:	
8% of invested capital for taxable year	436,184.00
Exemption	3,000.00
Excess profits credit	439,184.00
War profits credit:	
10% of invested capital for taxable year	545,230.00
Exemption	3,000.00
War profits credit	548,230.00

Schedule 14

Computation of total tax (1918)

		Income	Tax
Excess profits tax			
Net income for taxable year		$729, 672. 15	
Less excess profits credit		439, 184. 00	
Balance		290, 488. 15	
Taxable at 30%		290, 488. 15	$87, 146. 45
War profits tax			
Net income for taxable year		729, 672. 15	
Less war profits credit		548, 230. 00	
Taxable at 80%		181, 442. 15	145, 153. 72
Less excess profits tax			87, 146. 45
War profits tax			58, 007. 27
Total excess profits and war profits tax			145, 153. 72
Income tax			
Net income for taxable year		729, 672. 15	
Less:			
Interest on obligation of U. S. not exempt	$8, 185. 28		
War profits and excess profits tax	145, 153. 72		
Exemption	2, 000. 00		
		155, 339. 00	
Taxable at 12%		574, 333. 15	68, 919. 98
Total war profits, excess profits, and income taxes			214, 073. 70
Previously assessed: Original return		119, 673. 08	
Amended return		8, 565. 03	
			128, 258. 11
Additional tax to be assessed			85, 815. 59

23

Schedule 15

Net income as disclosed by revenue agent's report		$859, 430. 85
As corrected		880, 577. 38
Net additions		21, 146. 53
Addition: (a) Adjustment of bad debts	$25, 061. 58	
Total additions		25, 061. 58
Deductions:		
(b) Special claims reserve	1, 643. 22	
(c) Adjustment of depreciation	2, 271. 83	
Total deductions		3, 915. 05
Net additions as above		21, 146. 53

Schedule 16

Explanation of items changed

(a) Adjustment of bad debts:	
Bad debts allowed as deduction by revenue agent as shown on report dated January 27, 1921, page 15	$31, 946. 08
Amount allowable as deduction in accordance with recommendation of committee on appeals and review	6, 884. 50
Difference restored to taxable income	25, 061. 58

(b) For explanation see schedule 9, item (c).	
(c) Depreciation sustained during year (Exhibit A)	86,400.95
Depreciation allowed by revenue agent	84,138.12
Additional amount allowed as deduction	2,271.83

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Schedule 17

Invested capital

Invested capital disclosed by revenue agent's report		$5,728,196.07
As corrected		5,796,994.30
Net additions as explained below		68,798.23
Additions:		
(a) Adjustment of appreciation	$107,823.77	
(b) Additional bad debts disallowed 1918	9,659.27	
(c) Adjustment of 1917 additional tax	1,286.53	
(d) Adjustment of 1918 tax prorated	2,997.23	
Total additions		121,766.80
Reductions:		
(e) Special claims reserve	$13,468.20	
(f) Adjustment of depreciation reserve	39,500.37	
Total reductions		52,968.57
Net additions as above		68,798.23

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Schedule 18

Explanation of items changed

(a) For explanation see schedule 4, item (a).		
(b) Bad debts disallowed in 1918 and restored to invested capital by revenue agent		$30,442.40
Bad debts disallowed as deduction 1918 in accordance with recommendation of committee on appeals and review		40,101.67
Difference restored to invested capital		9,659.27
(c) Adjustment of 1917 additional tax; Additional tax for 1917 as deducted by R. A		26,199.80
Additional tax shown by amended return filed January 17, 1922	$2,575.42	
1917 additional tax to be assessed	22,337.85	
		24,913.27
Difference restored to invested capital		1,286.53
(d) Adjustment of 1918 tax deduction:		
Deducted by revenue agent		93,464.78
Proration of adjusted tax $214,075.70×.4226		90,467.55
Difference restored to invested capital		2,997.23
(e) For explanation see schedule 4, item (d).		
(f) Adjustment of depreciation reserve:		
Depreciation adjustment, Schedule II, item (d)		38,668.10
Add: Additional depreciation allowed in 1918		832.27
Net adjustment to December 31, 1918		39,500.37

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Schedule 19

Proof of invested capital

Capital stock		$2,991,800.00
Surplus		4,512,295.66
Reserves:		
Contingencies		10,000.00
Inventory		143,020.83
Sales, Marion		2,560.00
" Grand Rapids		2,991.35
Total, corrected balance sheet beginning of year		7,662,667.84
Brought forward—Total, corrected balance sheet beginning of year		7,662,667.84
Additions:		
Adjustment of appreciation		107,823.77
Additional capital stock sold		5.37
" bad debts disallowed in 1918		9,659.27
Total		7,780,156.25
Reductions:		
Good will limitation	$1,825,400.00	
Net adjustment depreciation	39,500.37	
Additional income tax 1916 and 1917	27,794.03	
1918 income tax prorated	90,467.55	
Total (deduct from above)		1,983,161.95
As shown on schedule No. 17		5,796,994.30

27

Schedule 20

Computation of excess-profits and war-profits credits

Consolidated net income, taxable year (schedule 15)	$880,577.38
Consolidated invested capital, taxable year (schedule 17)	5,796,994.30
Excess-profits credit:	
8% of invested capital for taxable year	463,759.54
Exemption	3,000.00
Excess-profits credit	466,759.54

Schedule 21

Computation of total tax (1919)

		Income	Tax
Excess-profits tax			
Net income for taxable year		$880,577.38	
Less excess-profits credit		466,759.54	
Balance		413,817.84	
Taxable at 20%		413,817.84	$82,763.57
Income tax			
Net income for taxable year		880,577.38	
Less:			
Interest on obligations of U. S. not exempt	$5,980.90		
Excess-profits tax	82,763.57		
Exemption	2,000.00		
		90,744.47	
Taxable at 10%		789,832.91	78,983.29
Total, excess-profits and income taxes			161,746.86
Previously assessed:			
Original return		144,301.85	
Amended return		1,835.04	
			146,136.89
Additional tax to be assessed			15,600.97

28 *Exhibit A to second amended petition*

Chicago Railway Equipment Company

Adjustment depreciation schedule

Buildings, 8%.

Dec. 31, 1916. Cost as previously stated:	
Revenue agent's report	$658,722.66
Less appreciation not previously eliminated	110,898.49
Balance	547,824.17
Additions during 1917 averaged $23,064.53÷2	11,532.27
Amount to be depreciated	559,356.44
Dec. 31, 1917. Balance	570,888.70
Additions during 1918 averaged $26,610.15÷2	13,305.08
Amount to be depreciated	584,193.78
Dec. 31, 1918. Balance	597,498.85
Additions during 1919 averaged $9,199.17÷2	4,599.59
Amount to be depreciated	602,098.44
Dec. 31, 1919. Balance	606,698.02

Depreciation allowable: 1917, $16,780.69; 1918, $17,525.81; 1919, $18,062.95.

Power plant, 5%.

Dec. 31, 1916. Cost as shown by revenue agent's report	$355,054.06
Additions during 1917: None.	
Amount to be depreciated	355,054.06
Dec. 31, 1917. Balance	355,054.06
Additions during 1918: None.	
Amount to be depreciated	355,054.06
Dec. 31, 1918. Balance	355,054.06
Additions during 1919: None.	
Amount to be depreciated	355,054.06
Dec. 31, 1918. Balance	355,054.06

Depreciation allowable: 1917, $17,752.70; 1918, $17,752.70; 1919, $17,752.70.

29 Machinery and tools, 10%.

Dec. 31, 1916. Cost as shown by revenue agent's report	$381,621.28
Items previously eliminated but in use	34,709.21
Additions during 1917 averaged $25,358.41÷2	12,679.21
Amount to be depreciated	429,009.70
Dec. 31, 1917. Balance	441,688.90
Items previously eliminated but in use	6,104.06
Additions during 1918: None.	
Amount to be depreciated	447,792.96
Machinery disposed of	843.35
Dec. 31, 1918. Balance	446,949.61
Amount to be depreciated	446,949.61

Depreciation allowable: 1917, $42,900.97; 1918, $44,779.30; 1919, $44,694.96.

Automobiles, 20%.

Dec. 31, 1916. Cost as shown by revenue agent's report	$2,762.00
Elimination by R. A. R. restored	5,473.79
Additions during 1917 averaged $2,035.00÷2	1,017.50
Amount to be depreciated	9,253.29

Dec. 31, 1917. Balance		10,270.79
Additions during 1918	$6,643.00	
Less amount chargeable to reserve	1,647.16	
	4,995.84	2,497.92
Amount to be depreciated		12,768.71
Dec. 31, 1918. Balance		15,266.63
Additions during 1919	$2,292.30	
Less amount chargeable to reserve	2,127.00	
	165.30	82.65
Amount to be depreciated		15,349.28
Dec. 31, 1919. Balance		15,421.93

Depreciation allowable: 1917, $1,850.66; 1918, $2,553.74; 1919, $3,069.86.

30 Patterns, 5%.

	1917	1918	1919
Depreciation as computed by revenue agents	$2,829.48	$2,829.48	$2,829.48
No adjustment required:			
Depreciation allowable as deduction (total of above)	82,114.50	85,441.03	86,409.95
Depreciation previously allowed	82,693.30	84,608.76	84,138.12
Additional amount allowed	578.70	832.27	2,271.83
NOTE.—Appreciation debited to asset account as shown by your brief			499,176.21
Appreciation eliminated by revenue agent			388,277.72
Additional appreciation eliminated in accordance with recommendation of committee on appeals and review			110,898.49

In the absence of information showing details how the appreciation of $499,176.21 had been distributed, the additional appreciation has been deducted from "Building account" as this account carries the lowest rate per cent of depreciation.

Now, July 23, 1929, the foregoing second amended petition certified from the record as a true copy.

[SEAL]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Answer to amended petition

Filed Jan. 26, 1929

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the amended petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraphs 1, 2, and 3 of the taxpayer's petition.

(2) Denies that the commissioner has committed the errors alleged in paragraph 4.

31 (3) Admits that the commissioner has refused to allow the depreciation asked for by the taxpayer on six plants owned by the taxpayer. Admits that five of the plants are of

brick and concrete construction and that one of the plants is of steel and corrugated iron construction. Denies the allegations of subdivision (1) of paragraph 5 not herein admitted.

(4) Denies the allegations of subdivisions (2) and (3) of paragraph 5.

(5) Admits that the commissioner has found the cost less depreciation of taxpayer's buildings as of December 31, 1916, to be $547,824.17. Admits that the commissioner has found the additions to the buildings during 1919 to be $9,199.17. Admits that a depreciation rate of 3% per annum has been applied to all of the taxpayer's buildings. Denies the allegations of subdivision 4 of paragraph 5.

(6) Admits that the commissioner has found the cost of taxpayer's power plant for the years 1917, 1918, and 1919 to be $355,054.06. Denies the allegations of subdivision 5 of paragraph 5 not herein admitted.

(7) Admits that the commissioner has found the cost less depreciation of taxpayer's tools and machinery at December 31, 1916, to be $416,330.49. Denies the allegations of subdivision 6 of paragraph 5 not herein admitted.

(8) Denies the allegations of subdivision 7 of paragraph 5.

(9) Admits that the taxpayer in 1918 claimed deductions for certain accounts alleged to be worthless. Admits that recoveries were made on some of these accounts and that the commissioner refused to allow as deductions $40,101.67 of said accounts. Denies that the item constituting the said amount of $50,101.67 were ascertained to be worthless and charged off within the taxable year.

(10) Admits that the commissioner for 1919 has refused to allow as deductions accounts aggregating $25,061.58 alleged to represent bad debts. Denies that the items constituting said amount of $25,061.58 were ascertained to be worthless and charged off within the taxable year.

(11) Denies that the commissioner's values of the taxpayer's assets for depreciation purposes are less than the fair value thereof.

(12) Denies that the depreciation rates used by the commissioner are less than the rates necessary to reflect the loss from exhaustion, wear, and tear.

(13) Denies that there was any increased depreciation upon the taxpayer's plant or equipment during the war years.

(14) Admits that the commissioner in computing the in-
32 vested capital for 1917 refused to allow as part of surplus the
sum of $15,641.55 representing Federal taxes due from the
taxpayer for 1916. Denies that any error was thereby committed.

(15) Admits that the commissioner in computing the invested capital for 1918 refused to allow as part of surplus the sum of $91,386.67 representing the prorated amount of Federal taxes due from the taxpayer for 1917, and the further sum of $2,880.76 representing additional Federal taxes due from the taxpayer for 1916. Admits that an error was committed in that the difference between

the full amount of Federal taxes for 1917 and the said prorated amount of $91,386.67 was included as a part of surplus for 1918. Avers that no portion of the Federal taxes for 1917 should have been included in surplus.

(16) Admits that the commissioner in computing the invested capital for 1919 refused to allow as part of surplus the sum of $90,467.55 representing the prorated amount of Federal taxes due from the taxpayer for 1918 and the further sum of $27,794.03 representing additional Federal taxes due from the taxpayer for the years 1916 and 1917. Admits that an error was committed in that the difference between the full amount of Federal taxes for 1918 and the said prorated amount of $90,467.55 was included as a part of surplus for 1919. Avers that no portion of the Federal taxes for 1918 should have been included in surplus.

(17) Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified, or denied.

PROPOSITION OF LAW

(a) The exhaustion, wear, and tear was computed in accordance with section 5 (a), item (1) of the revenue act of 1917, and section 214 (a) (8) of the revenue act of 1918.

(b) The alleged bad debts referred to in the petition do not come within the provisions of section 214 (a) (7) of the revenue act of 1918.

(c) Amounts payable on account of Federal income and excess profits taxes for the preceding year may not be included in accordance with section 326 of the revenue act of 1918 in the computation of the taxpayer's invested capital for the taxable year.

33 Wherefore it is prayed that the deficiency be recomputed upon the basis of the elimination from surplus for 1918 and 1919 of the entire liability for Federal taxes for 1917 and 1918, respectively, and that the commissioner's determinations in other respects be approved.

[SEAL.]

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for the Commissioner of Internal Revenue.

Of counsel:
L. C. MITCHELL,
Special Attorney,
Bureau of Internal Revenue.

Now, July 23, 1929, the foregoing answer to second amended petition certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Supplemental petition

The above-named petitioner respectfully represents that within sixty days from the time of the receipt of the deficiency letter from the Commissioner of Internal Revenue, dated March 14, 1925, it filed with the United States Board of Tax Appeals its appeal denying the right of the commissioner to assess income and profits taxes for the calendar years 1917, 1918, and 1919, and that on the 19th day of December, 1925, it filed before the said board its second amended petition, and that on the second and third days of February, 1926, evidence was introduced on the merits before this honorable board on said second amended petition, and final decision was entered on the 4th day of November, 1926; that the petitioner sued out a writ of error from the United States Circuit Court of Appeals for the Seventh Circuit on the 22nd day of December, 1926, and such proceedings were subsequently had in said Circuit Court of Appeals that the decision of the Board of Tax Appeals was reversed and a mandate issued to said Board of Tax Appeals requiring it to set aside its decision entered on November 4, 1926, and that pursuant to said mandate, said cause has been redocketed and said decision of November 4, 1926, set aside and held for naught.

34 I

Petitioner further represents that since the trial of this cause on the second and third days of February, 1926, the Congress of the United States has enacted the revenue act of 1926, wherein it is provided by section 277 that income, excess-profits and war-profit taxes for the years 1917, 1918, and 1919 shall be assessed within five years after the return was filed by the taxpayer, and that no assessment of a tax or collection thereof by distraint or by proceeding in court shall be had if, at the time of the enactment of the act (viz. February 26, 1926), such assessment, distraint, or proceeding was barred by the statutory period of limitation properly applicable thereto, unless, prior to the enactment of such act, the commissioner and the taxpayer agreed in writing thereto, and it is further provided by section 1106 of said act that the bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy, but shall extinguish the liability.

II

Petitioner further alleges that it filed its income-tax return for the year 1917 with the collector of internal revenue of Chicago, Illinois, on or about the 28th day of March, 1918, its income-tax return for the year 1918 with the said collector on or about the 16th day of June, 1919, and its income-tax return for the year 1919 with said collector on or about the 7th day of May, 1920.

III

Petitioner further alleges that on or about the 9th day of December, 1925, it received a letter from the then Solicitor of Internal Revenue, dated December 7, 1925, a copy of which is attached hereto, marked "Exhibit A," which said letter also contained a blank form of waiver, a copy of which form is attached hereto, marked "Exhibit B," and pursuant to the request contained in said letter, petitioner forwarded to the Commissioner of Internal Revenue at Washington, D. C., by mail, on or about the 10th day of December, 1925, an executed waiver, in duplicate, for the years 1917, 1918, and 1919 under the form of waiver sent petitioner as aforesaid by said Solicitor of Internal Revenue, and that petitioner has not executed any other waiver nor agreed in writing with the commissioner for a waiver of the bar of the statute of limitations for the years 1917, 1918, and 1919, or any of said years, since said 10th day of December, 1925.

IV

Petitioner further avers that no notice of the deficiency in tax for the years 1917, 1918, and 1919, or any of such years, has been sent to it by the Commissioner of Internal Revenue since the forwarding by mail on the 10th day of December, 1925, of said waiver mentioned above, nor has it filed an appeal with the United States Board of Tax Appeals from any notice of deficiency in taxes for the years 1917, 1918, and 1919 since said 10th day of December, 1925.

V

Wherefore the petitioner prays that the determination of the respondent for the deficiency assessment in the sum of twenty-two thousand three hundred twenty-seven dollars and eighty-five cents ($22,327.85) for the calendar year 1917, and the deficiency assessment in the sum of eighty-five thousand eight hundred fifteen dollars and fifty-nine cents ($85,815.59) for the calendar year 1918, and the deficiency assessment in the sum of fifteen thousand six hundred nine dollars and ninety-one cents ($15,609.91) for the calendar year 1919 may be set aside and held for naught and barred by the statute of limitations and that the petitioner may have such other and further relief as may seem meet.

William S. Oppenheim,
Counsel for Petitioner,
904 First National Bank Bldg., Chicago, Illinois.

[*Duly sworn to by Edward T. Walker: jurat omitted in printing.*]

36 Subscribed and sworn to before me this 28th day of December, A. D. 1927. I do further certify that I am authorized to administer oaths under the laws of the State of Illinois.

sgd. FREDERICK R. WYBERG,
[N. S.] *Notary Public.*

Copy

Exhibit A to supplemental petition

TREASURY DEPARTMENT,
Washington, December 7, 1925.

SOL: A: LCM

CHICAGO RAILWAY EQUIPMENT CO.,
1928 West 46th Street, Chicago, Illinois.

SIRS: It appears from the records of this office that you have filed an appeal with the United States Board of Tax Appeals, protesting the assessment of additional taxes for the years 1917, 1918, and 1919, and as it is impossible at this time to determine whether the case will be disposed of by the board prior to the expiration of the period of your waiver, you are requested to execute in duplicate and to return to this office at once the enclosed waiver forms.

If the waiver forms are not executed and returned to this office immediately, the commissioner may find it necessary to make assessment of the proposed deficiency under the provisions of section 274 (d) of the revenue act of 1924. If such action be necessary the collection of the amount of the assessment, or so much thereof as may be in controversy, might thereafter be stayed, pending final determination of your appeal by the board, upon the filing of a claim for abatement, accompanied by a bond, pursuant to the provisions of section 279 (a) of the revenue act of 1924.

In replying to this letter please refer to SOL: A.

Respectfully,

A. W. GREGG,
Solicitor of Internal Revenue.

Enclosures.

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37 Copy

Exhibit B to supplemental petition

Income and profits tax waiver

For taxable years ended prior to January 1, 1922

CHICAGO, *Dec. 15, 1925.*

CHICAGO RAILWAY EQUIPMENT CO.,
1928 W. 46th St., Chicago, Ill.

In pursuance of the provisions of existing Internal Revenue Laws ________________, a taxpayer of ________________ and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) _______________ under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said board.

____
Taxpayer.
By_______________________
____
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Now, July 23, 1929, the foregoing supplemental petition certified from the record as a true copy.

[SEAL.]
B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

38 Before U. S. Board of Tax Appeals

Answer to supplemental petition

Filed Feb. 20, 1928

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, for answer to the supplemental petition of the above-named taxpayer, admits, avers, and denies as follows:

1. Admits the allegations of Paragraph I of the supplemental petition except the allegation that the decision of the board was reversed by the Circuit Court of Appeals. Admits that the board was reversed in part but avers that it was sustained in part.

2. Admits that on February 26, 1926, Congress enacted the Revenue act of 1926 containing, among other provisions sections 277 and 1106. Except as admitted herein, denies the allegations of Paragraph II of the supplemental petition.

3. Denies the allegations of Paragraph III of the supplemental petition.

4. Admits on or about December 10, 1925, appellant executed a waiver covering the years 1917, 1918, and 1919. Except as admitted herein, denies the allegations of Paragraph IV the supplemental petition.

5. Denies the allegations of Paragraph V of the supplemental petition.

6. Denies generally and specifically each and every allegation contained in the supplemental petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the relief asked for in the supplemental petition be denied.

[SEAL.] C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
L. C. MITCHELL,
Special Attorney, Bureau of Internal Revenue.

Now, July 23, 1929, the foregoing answer to supplemental petition certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

39 Before United States Board of Tax Appeals

Docket No. 3964 and Docket No. 18438

IN THE MATTER OF CHICAGO RAILWAY EQUIPMENT CO., PETITIONER,
vs.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Statement of Evidence

Be it remembered that the above entitled consolidated appeals came on for hearing on the merits upon the issues raised before the Honorable C. P. Smith, member of the United States Board of Tax Appeals, on the 22nd day of March, 1928, at Washington, D. C., and the following proceedings were had and testimony heard.

Upon motion of the petitioner it was ruled that the evidence which had been received upon the former trial of the appeal, Docket No. 3964, will be considered as in evidence upon this consolidated hearing, and such evidence would be considered so far as it might be relevant in Docket No. 18438, to which ruling of the Board the Respondent excepted.

Deposition of A. J. CANNATA, a witness, who, after being duly sworn, was examined by Mr. Oppenheim, counsel for petitioner:

My name is Andrew J. Cannata; I am fifty-nine years old and reside at Niles, Michigan, and am employed in the production department of the Kawnerr Company. I was indirectly in the employ of the Chicago Railway Equipment Company by doing work for them through Coats and Burchard Company. Have been in my present employment a little over seven years. Prior to that I worked for Coats and Burchard Company twenty-two years. Was with the Coats and Burchard Company continuously during that time, with the exception of one year when I worked for another firm in the same line of work. I was field manager for Coats and Burchard in the years 1915 and 1916, and their business was that of appraising buildings, machinery, and manufacturing plants, and other buildings in that line of work; also residences. They did business throughout the United States and Canada and I was connected with the appraisal of the plant of the Chicago Railway Equipment Co. at Franklin, Pennsylvania, in the year 1915. We made a complete appraisal of the buildings, machinery, and equipment. I was sent there by Coats and Burchard Company and paid by that company. I had four men with me and we were about three weeks appraising the plant. The greater part of the plant was all-steel constructed buildings, with iron siding or sheeting. The outside was corrugated steel and the inside of the buildings was steel construction. The plant was practically a new one. It was a rolling mill, foundry, and everything of that kind.

The book, which you hand me, having on its back the name "Franklin" and on its face the words, "Appraisal, Franklin Steel Works, Franklin, Pennsylvania," is a complete appraisal of the plant at Franklin with contents, building, and equipment. I presume the property belonged to the Chicago Railway Equipment Company. I made the appraisal by putting the men who were considered as experts upon the line of work in which they were qualified; one man on pipe and fittings, another construction man; my end of the work was machinery. Then I had one or two other men could do practically anything. When I say "anything" I mean who could count electric lights, or if they had a sprinkler system, count the heads—general utility work. The construction man was an A No. 1 man; the pipe and fitting man was an A No. 1 man, and I consider myself as No. 1. I had eleven or twelve years' experience up to the time I did that work. We had the drawings of the plant because it was new, figured up the quantities that would go to make up the foundations, walls, and girders; everything to make a complete building. Then the pipe and fitting man would measure up all the pipe and fittings. I went around and listed each machine, makers' names, when they were made, and then other men I would send out and tell them to count the electric lights, or get the fire extinguishers or different things that would go into the make-up of a plant, and we would put these right on field notes. After those notes were on paper, I would go around—for instance: If I was in Chicago, to the Crane Company or J. B. Clow, and get discounts on the pipe and fittings; then I would go to large contractors and get prices on the building materials. I would furnish the men with the different prices and discounts obtained locally wherever the work was. On machinery I would take and send the notes in to Chicago and

they would take and write to the manufacturer a personal
41 letter asking for the price on that one particular machine furnished, say to the Franklin Steel Works. I guess that, offhand, the letter would start off something like this: "In making the appraisal of the Franklin Steel Works, we found machines of your manufacture which we would be pleased to have you quote us present day price of that machine," and they would get that by letter and apply that to field notes and after the prices were all in, they would have the clerks figure them up. The prices were the fair market value at that time. We were figuring upon replacement values. In looking at the book marked "Franklin" I looked more at the map than at the building, because it brought to my mind about pretty near everything being new there more than anything else. This book contains an accurate statement of the property which I appraised and the fair market value of the property at that time. This was the fair market value of the property at Franklin. All prices were received locally; our pipe and pipe fitting and everything of that kind; building materials and everything was local. The date of the certification of the Coats and Burchard Company attached to the book is November 27, 1915. The prices in this book are the reproductive values at that time.

Cross-examination by Mr. Delaney:

Before I was employed by Coats and Burchard, I was a machinist. When I started to learn, I did everything in the machine line. The trade at that time was different than it is at present. To-day a machinist may be a drill man, a bench man, a milling machine man. Forty years ago when a man learned a trade, he learned his trade so he could run any and all kinds of machines. A man could tell you to go to such and such a place to see what was wrong and you could see what was to be done and if it required repairing, you could do any of the work without having to apply to anybody else. I had no experience in appraising property before I was employed by Coats and Burchard Company, with the exception of knowing machinery when I see it. The value of machinery was put in our office by the manufacturer. They furnished the value of machinery. So far as appraising property is concerned, I had no experience before that time and my experience was simply in the mechanical operation of machinery, nor had I any experience up to that time of
42 the putting of values on machines nor on a building. I was interested in the building business before that time with a man by the name of Phillips, for five years. I was one of the partners and we were actually engaged in the construction of buildings in Wilmette and Evanston; principally frame buildings; not such buildings as are erected by industrial plants. I had been with Coats and Burchard Company some eleven or twelve years prior to 1915. My first employment by the Coats and Burchard Company was a workman on machinery. I held that position about three years and was then promoted in charge of a gang. One man of a gang would

be a pipe and fitting man; another would be an estimator on buildings; different lines of work bearing on the plant we were going to apprise. If they had patterns, they would send a pattern maker. And if they had special tools, they would send a special tool man. I held position as foreman of the gang for about nineteen years; not o[illegible]articular gang, but different men at different times. The gang would make a complete appraisal of property, including machinery, equipment, buildings and everything else that was in the plant. I did not do it all myself, but was in charge. In estimating the final values of the equipment, etc., we put the values on in the field in the town we did the work. By "we" I mean myself and assistants. These figures went into the final report which was made to our client, and could not be changed; that is, it was impossible to change the figures and have a true appraisal, because our original field notes would show them up. There was no one had any authority to change the field notes.

This appraisal was made in 1915 and took about three weeks. I never saw this book before, but I know it is correct as it was taken from my field notes. I know that it was taken from my field notes because they are not doing that kind of business. There is no chance for a mistake because the work is checked three different times. I never saw this book before and assume that it is a correct copy of my report on account of my experience with the Coats and Burchard Company.

Mr. Delaney. I object to the book being received in evidence.

Redirect examination:

Our appraisal would be made some four or five weeks before

43 this book would be gotten out and certified by the company.

It would take about a month from the time they received the notes in the office until they delivered the book. I understand Mr. J. B. Halifax is dead. I do not know that Mr. Halifax had charge of valuations of the Chicago Railway Equipment Company at Detroit.

Deposition of Mr. H. J. Sullivan, witness, after being sworn, examined by Mr. Oppenheim:

My name is Hugo J. Sullivan, residing in Chicago, Illinois. My business is that of superintendent of construction and I am thirty-seven years old. I represent Barry, Byrne and Ryan Company of Chicago as superintendent of construction and have been in their service for two years. Prior to that I was in the appraisal business, connected with the Coats and Burchard Company. Went with the Coats and Burchard in May, 1910, or about that time, and remained in their service until I left them some two years ago, except for a little holiday in France. I supervised the appraisal of the plant of the Chicago Railway Equipment Company at Marion, Indiana, known as the Marion Malleable Iron Works, in November, 1915, possibly the first part of December. I had three assistants and

supervised the work. They worked under my direction. The plant was a malleable foundry and large machine shop for maintenance work and some machining of parts which they made. In general it comes under the head of a malleable foundry, which explains to those initiated anything that is necessary. The map in the book which has on its back the word "Marion" and on its face "Appraisal of Marion Malleable Iron Works of Marion, Indiana," is a copy of the map that was made under my supervision and on which I actually worked and spent time. There were fifteen or sixteen buildings, I believe, possibly more. The numbers ran higher than the buildings which are in the plant. In making this appraisal the men assigned to me were men who would work along certain lines; such as a building man would do all building work; that is, take off quantities and write them on regular field note paper, as we term it, and I would go into a town or locality and secure prices of building materials at that time. He would price these quantities at a unit price from these prices that I obtained for him, which prices were prevailing at the
time we made the appraisal. Then I would have a mechanical
44 man that would go out and list all mechanical piping, heating
piping, and miscellaneous piping necessary to a plant, and
these prices were also obtained locally, and along with these prices were furnished prices from our office, similar to a salesman that travels for a house is furnished prices from time to time as prices change, and we would compile our notes from these prices made and the quantities taken and turn them over to the office to be extended, as we term it, and typewritten. Of the machinery and equipment on these two particular plants, I took that myself. I refer to the plant at Marion and the one at Grand Rapids. I listed the equipment and machinery myself. Miscellaneous items throughout the plant, factory furniture, benches, stock, small tools, and other items that go to furnish equipment in a plant of this kind would be taken by special men in the course of the work, and then we would clean up the smaller items.

This book contains a correct description of the Marion plant, if I am guided by the certificate in front of the book. It is an exact duplicate of the field notes I sent in to the Chicago office at that time. It contains the items of the property and the prices listed by buildings and under the various headings as we compiled the notes, prices by us. Depreciation figures were put on by us, but we made no extensions or additions. The installation cost of machinery was put on by us and the prices of machinery were obtained from manufacturers and along with shipping weights. The prices we show were the ones put on by our shipping department. This book represents the reproductive value of this property at that time without any depreciation shown.

I also made the appraisal of the property of the Chicago Railway Equipment Company at Grand Rapids, Michigan, known as the Grand Rapids Malleable Works. The map contained in the book having on its back the words "Grand Rapids" and on its face

"Appraisal, Grand Rapids Malleable Works, Grand Rapids, Michigan," is a correct map of the plant of the Chicago Railway Equipment Company at Grand Rapids, Michigan, as of the fall and winter of 1915 and was made under my supervision. I actually worked on it and to the best of my knowledge and the procedure usually followed, it is correct. The buildings found there were of brick and concrete with steel roof trusses of fireproof nature; substantial construction. The buildings at Marion resembled this plant at Grand Rapids; fireproof or slow-burning construction. The majority of the buildings were of steel-truss roofs, brick walls, and corrugated iron roofing; buildings that are generally used in factories or foundries of this kind. The plant at Grand Rapids was a malleable plant engaged in the casting of malleable parts of machinery to a small extent. The procedure of appraising the Grand Rapids plant was the same as on all these jobs. I had the same crew on this job; in fact I did the Grand Rapids plant first and proceeded to Marion after finishing this job with the same men, with the exception of one man that was sent to Marion to assist me there, because it was a somewhat larger plant. We proceeded along the lines laid down by common practice; that is, the practice that was laid out to us by Coats and Burchard Company, and worked along the same lines, you might say, in all appraisals made by us. There was nothing unusual in this report. I determined values by obtaining prices locally of various commodities we were interested in and used them for unit prices. In appraising, our various lists, such as buildings, small tools, piping, and as in the Marion plant, machinery, went into the Chicago office to be priced from our correspondents who were the manufacturers. There is no doubt in my mind that this book is a true copy of those notes sent into the Chicago office, it having been certified by Coats and Burchard, by whom I was employed at that time. The prices fixed against the various articles are based on my knowledge of my actions at that time in securing those prices as to the preproductive value of the property. I went to J. H. Hockens & Sons in Grand Rapids and secured my prices on brick work and stone work. They are material-supply people in Grand Rapids. I also secured prices on cement, sand, and gravel and other building materials. I secured my lumber prices, wholesale and carload lots, from the Fuller Station Lumber Company. Prices on piping I obtained from the Leitelt Iron Works at Grand Rapids. The other prices, such as tools and scales, etc., were prices from current catalogue price lists furnished us by the manufacturers, such as Fairbanks, the Shannon Company of Chicago. In fact, we carried quite a catalogue of files that were gotten up to date by our company and through our own effort. If we saw a nice catalogue, with up-to-date prices which we thought we could use, we would gladly take it with us. All those prices were priced from lists we carried with us.

46 *Cross-examination by Mr. Delaney*

I made no comparison of this map with the working material which I prepared; that is, there was no comparison made by me between this map and the map I drew up. This is the first time I have seen this map in the book. I might have seen the report at the office at the time of its completion, but do not remember. The same is true of the Grand Rapids plant. This map is a photostat of the map I sent in. It is not exactly a photostat—it is a black line drawing. I do not know how to exactly answer that I know this is a black line drawing, but just from my knowledge of drawings, I know this is what we term a black line drawing. After my map was made, it was given to the printer to make this reproduction. This is a printer's reproduction from our original map. He reduced it from the size which he made, which is possibly 1/10 or 1/20 scale and this I believe is a 120th. Our maps were often larger than this table top when we made them. Usually we made them in the engineer's scale of ten feet to an inch; possibly 50; depending on the size of the plant, so we could put them on a sheet which was adaptable, so they could be used. Those drawings were sent in to our drafting department and they were sent out to be blue printed and this small map made up. We had an outside blue print concern. The blue print people sent it to us. This map was put into the book by being bound by the bindery. This map of the plant came from the printers. Our original map was traced and reduced in size to this size, so it would fit this bound book that we furnish our report in, and this reduced drawing or tracing that we took from our original drawing was sent to the blue print people and they made up this drawing and furnished it to us off our tracing. I do not know that I ever saw this particular sheet until this morning. I may have seen it in the office. Sometimes we are interested and we go back to see what our reports look like. I can only testify that to the best of my knowledge and belief it is a correct copy of the map I made. I first saw these books this morning, and I have no way of saying they are correct with our field notes, except the confidence which I have in the Coats and Burchard Company and their certificate here which covers that. No changes should be made in our field notes. The change which you call my attention to in the Marion Malleable Iron Works' appraisal of some figures is explained here.

2,330 square feet of galvanized iron sheeting, 51,260 pounds
47 at 8¾ cents. Our office made an error by using this unit
against the pounds instead of against the square foot price which is 2,330 square feet at 8¾ cents, which makes a difference of $4,944.99 which was taken from the building No. 11. We merely sent this to the Chicago Railway Equipment Company asking them to please insert this sheet in the front part of the appraisal. These figures were put in by their auditor. This appraisal when it was first given to the Chicago Railway Equipment Company was

incorrect for a period of time, but with that one exception it was correct. There are no other mistakes explained in the front of this book. That one sheet refers to only that one change. That mistake is followed the whole way through so that the total as stated—it just extends that one error which occurred in our office in the extension. The letter here which is headed "Contract 2909 Chicago Railway Equipment Company, Chicago, Illinois" is simply to correct this mistake which went out originally in this book. (Letter referred to is in the front of the book marked "Marion Malleable Iron Works" and the error referred to is on page 258 of the same book.) We made no extensions of prices on equipment. Merely furnished the unit price. I know the unit prices are correct and the extensions can easily be checked up. The unit prices are correct and I put them on myself. These sheets are not my actual work; they are copies of it. It is possible for unit prices to have been changed by error between my working papers and the time these sheets were made up, but not likely, because our field notes are checked by one girl and taken to another and checked, and they are typewritten and then these extensions are checked and compared back, field note against the copy. There is very little likelihood of an error getting in because one had to balance the other. It is possible for errors to get in. The error in this book was in the extension made by the girl and where she used the unit price against pounds instead of against the square feet. The field note was correct. We merely put in the pounds there and it was priced by the foot and the girl took the wrong figure in computing her cost.

Mr. DELANEY. In view of the fact this gentleman can not state the figures in these appraisal books are correct of his own knowledge, I object to them being introduced as evidence, and the course will be decided at Washington.

48 Redirect examination:

Mr. Koch is in Jacksonville, Florida. He made the appraisal of the Chicago plant of the Chicago Railway Equipment Company. That is, I heard so at the time. I do not recall who Mr. Halifax was.

Deposition of EDWARD B. LEIGH, who, after being duly sworn, was examined by Mr. Oppenheim:

My name is Edward B. Leigh; I live at Chicago, Illinois, and am president and general manager of the Chicago Railway Equipment Company. Have been its general manager from its organization in 1892. My duties of general manager since '92 have been to have the general supervision and operation of the company. In 1915 we had the Chicago plant; the old plant at 40th and Princeton Avenue; the Marion Malleable Iron Works at Marion, Indiana; Grand Rapids Malleable Iron Works at Grand Rapids; our Detroit plant at Detroit, Michigan; and the Franklin Steel Works at Franklin, Pennsylvania. I cannot give the dates of the acquiring of the several properties, but they were all prior to 1913. We had not owned the Franklin plant for a great while. My recollection is that we bought that plant in 1912 or 1911. Part of the Franklin plant was burned before 1915 and it was rebuilt. A considerable portion of it was destroyed; I should say at least 75%. It was a rolling mill, and in addition we built a brake beam plant some two or three years prior to 1915 at Franklin. It was almost complete, but not quite, at the time the fire was had at the plant. The fire was early in 1912. I am testifying from memory. It might have been in 1913. We re-constructed the plant at Franklin after the fire.

We had owned the Detroit plant since about 1903. We built the buildings on the Detroit property. We acquired the Grand Rapids plant about 1905. Most of that plant was subsequently burnt. We reconstructed and also enlarged it. Marion plant was acquired about 1906. Considerable addition was put on to this plant between 1906 and 1915. The Chicago plant, the one which we now occupy, was built in 1907 and 1908. We moved the first of January, 1908, although it was not anywhere near completed. We have another building in Chicago owned by the Chicago Railway Equipment Company—it's our old plant—at 40th and Princeton
49 Avenue. That had been abandoned as a manufacturing plant when we went into our new plant at 46th and Winchester. I had to do with the acquiring of these plants and with the construction of the buildings; that is, the supervision and the letting of the contracts, and am aware of the value of the additions we put on there and of the property. We had an appraisal made of these plants in 1915 by Coats and Burchard. We always had our plants appraised. Prior to 1915, our appraisals were made by the American Appraisal Company. The purpose of the appraisal is, first, a complete inventory of all properties which we could not have in a condensed form in any other way. Then for insurance purposes. We received these appraisals from the Coats and Burchard Company substantially at the time of the dates of the appraisals themselves; of the certificates. There were separate appraisals for each plant. The six books which are before me, marked "Appraisal," having on their backs the words "Detroit," "Chicago," "Franklin," "Grand Rapids," "Marion," and "Patterns," are the Coats and Burchards appraisals of the various plants, with the buildings, machinery, and contents; in fact, everything they found in these plants. The Princeton Avenue property is in a separate folder. The depreciated summary report, purporting to be made by Coats and Burchard Company under date of December 31, 1915, is a summary of the appraisal of the 40th and Princeton Avenue Building, there being no contents in the building. It was occupied by a tenant.

I examined these various appraisals which were furnished us by the Coats and Burchard Company at the time they were received by the Chicago Railway Equipment Company in a general way;

not for detail. I examined the summaries of the valuations of the plants and was in a general way aware of the valuation which was placed by the Coats and Burchard Company upon each of these plants, as well as the contents. I have no doubt that the valuation placed by Coats and Burchard Company upon these various properties as represented by these books is a fair, reproductive value of these properties at that time. My recollection is that after the Coats and Burchard appraisals, we found the reproductive values were very much in excess of what we called the "book value"; that which we were carrying on our books, and some time under the order of the board of directors, a portion of the depreciated value was added to the book value: part of it carried to depreciation account and part of it I instructed Mr. Forward to carry to surplus account. These properties were acquired under my direct supervision. All the negotiations for the purchase of the plant or the construction of a plant were done under my direction. The purchase of machinery for whatsoever purpose was always referred to me for approval: more often for consultation.

The value of the Detroit plant as shown by the appraisal and its machinery is $156,185.00. In my judgment that is a fair, reproductive value of that property at that time. That property was dismantled as a brake beam plant and in 1918 we operated it for the forging of six-inch shells for the United States Government. We subsequently sold it. Most of the machinery was moved to our different plants. I find I went over this inventory very carefully with Mr. Harrison, our then general superintendent. I think you will find many of these marked in my handwriting "moved." [Looking at book.] Yes, here they are. Those of the machines that were not sold were moved to one of the other plants. The appraisal of the Marion plant was $333,455.00, and that in my judgment is the fair reproductive value of that property as of that time. The Coats and Burchard Company appraised our Chicago plant at $344,600.00, and that, in my judgment, is the fair reproductive value of that property at that time. The Franklin plant is valued by the Coats and Burchard Company at $493,885.00, and in my judgment that is the fair reproductive value of that property at that time. The Grand Rapids plant was reported by the Coats and Burchard Company as of the value of $354,814.00, and that, in my judgment, is the fair reproductive value of that plant at that time. The appraisal of the Chicago-Princeton Avenue property was $37,942.00.

During the years 1917, 1918, and 1919 we had, owing to war conditions, extraordinary operation of these plants. There was a very high demand for work: increased output. We had great difficulty with labor, particularly in 1918. Labor was not only scarce, but very high and very inefficient. The effect of this in my judgment was that it very materially increased depreciation of our machinery and tools. If you assume that 10% is a fair depreciation upon machinery under normal conditions, while it is difficult to answer

in all particulars, I would say offhand that an average of 50% should
be addeded to the depreciation on machinery for these abnormal
51 conditions. That is my judgment at this moment. I have
not refreshed my memory nor looked into any facts.

During the year 1918 we charged off accounts according to our custom. I remember the conditions under which this charge-off was made. For more than twenty-five years I think it is, we had Price, Waterhouse & Company to audit our books and accounts. They have made very careful audits and they were very punctilious people. My attention would be called to accounts which in their judgment were bad and should be charged off. It is my practice to ascertain the facts in regard to these accounts and wherever it seemed as though the account was hopeless, it was charged off. I have a list of accounts to be charged off which are in dispute. During the year 1918 we charged off something like $60,000.00; that is at the expiration of 1918. The unit acting for the Commissioner of Internal Revenue has rejected some $41,000.00. I have a list of those rejected accounts. First I have on the list St. Louis Car Company, $1,100.00, on which there has been no recovery to date. Second the Superba Manufacturing Company, $1,396.40. At the time of the closing of the books for 1918—material for that account was furnished on the 16th day of February, 1917, there had been no collection of it. After twenty-three months it was considered hopeless and charged off. The Lawson Construction Company, $2,000.54, for materials shipped in April and May, 1917. Eighteen months without any collection or hope of collection, and I ordered that charged off as hopeless. The Smith Motor Truck Company, $18,217.17 for material furnished in June and August of 1917, and on which we had no recoveries for the period of about fifteen months, and the condition of that concern, which I had occasion to investigate aside from our auditors, was about as hopeless as any account I ever saw. The Star Specialty Company, $2,300.15 for material furnished in 1917—September—after having run for a period of fifteen months without any hope of getting anything, that was charged off. The Pittsburgh Hickson Company, $9,000.00 for material furnished in March, 1917, a period of nearly twenty-three months, was in the hands of a receiver or bankrupt and the account seemed entirely hopeless and we charged that off. The Maxfer Truck Company was an unusual situation. They owed us about $20,000.00 and I was
appointed as one of the creditor's committee. Under my
52 suggestion, Price, Waterhouse & Company audited their books
to give us some idea of what the situation was and to them
it was so hopeless that they called me up and wanted to know where they were to get their thousand dollar fee. They had a man by the name of Smith, and how he ever did it, I never knew, but by taking chips and whetstones and all sorts of unique methods, he managed to collect and I think he paid us $13,000.00. This represents the balance of $6,000.00, and while we originally thought that account was not worth ten cents on the dollar, I certainly felt that the

$6,000.00 was entirely hopeless and charged that off. There was a small item of W. K. Mulholland of $87.35. I don't remember about that particular account. In the general course of business, subsidiary plants look after their own collection. It is only when some unusual condition develops that it is brought to my attention. I might say that all of these things were done under my direction. Price, Waterhouse & Company called my attention at this time to these particular accounts, except the account of Smith and the Maxfer Motor Truck Company, they called my attention and insisted upon them being written off. This was done upon their annual examination of our books for that year.

Mr. LEIGH. I ask that the several books of appraisal furnished by the Coats and Burchard Company to the Chicago Railway Equipment Company be marked by the notary public for identification. I ask that the book marked on the back "Grand Rapids" and on the face "Appraisal, Grand Rapids Malleable Works, Grand Rapids, Michigan," be marked as "Taxpayer's Exhibit 1" for identification.

Book marked on the back "Franklin" and on the face "Appraisal, Franklin Steel Works, Franklin, Pa.," be marked as "Taxpayer's Exhibit 2" for identification.

Book marked on the back "Chicago" and on the face "Appraisal, Chicago Railway Equipment Company, Chicago, Illinois," be marked as "Exhibit 3" for identification.

Book marked on the back "Detroit" and on the face "Appraisal, Chicago Railway Equipment Company, Detroit Forge Plant, Detroit, Michigan," be marked "Taxpayer's Exhibit 4" for identification.

Book marked on the back "Marion" and on the face "Appraisal, Marion Malleable Iron Works, Marion, Indiana," be marked as "Taxpayer's Exhibit 5" for identification.

And the small folder marked "Chicago Railway Equipment
Company building and equipment located at 4060 Princeton
53 Avenue, Chicago," be marked "Taxpayer's Exhibit 6" for
identification.

Cross-examination:

These appraisals which I have had marked for identification were all appraisals of our plants about November or December, 1915, and one is dated February, 1916. When we received these appraisals our books were made to conform to a certain extent with the figures shown in these appraisals. I do not have the exact figures in mind. I would like to have you understand that we were carrying our property account on the books. Where these appraisals showed a reproductive value considerable in excess of book value, an adjustment was made taking the appreciation into account and the increased value was added to the value of the various plants and part of the appreciation put into our depreciation account, and we had to offset the difference by crediting to our surplus account the net

appreciation. I was not consulted with regard to the rates of depreciation which should be made by the Coats and Burchard Company. I left that to their judgment, their field men being in a much better position to determine that than anyone else and I should say they were in a better position to write the depreciation on our plants than I would be myself, although I have been attached to these plants since 1892. They were men who are skilled in that particular and they are experts and they can accomplish in a short time what it would take me, for instance, a long time to do. I never have given any special study to the rate of depreciation on our different plants and equipment. I have delegated a great deal of that to our auditor, who is much more of an expert on it than I am. The depreciation as shown by our books is not necessarily the result of the opinion of our auditors. It depends on what you call the depreciation on our books. A portion of the depreciation shown on our books is the depreciation arrived at by the appraisal company. In the year 1916, we charged off $100,000.00 depreciation. That was the year of a very great volume of business, and in the judgment of our auditors, Price, Waterhouse & Company—we got together and discussed it—we decided that was a fair depreciation. At that time we had in our possession the appraisals made by Coats and Burchard Company. I do not remember that we
54 particularly referred to the appraisals made by Coats and Burchard to ascertain what would be the reasonable depreciation of these different items of equipment. The figure $100,000.00 was arrived at from the best judgment we could exercise. It was simply a round sum which was supposed to take care of all the depreciation on our plants and equipment for that year. That, in our judgment, was about the best estimate we could make of that depreciation. I took it that these appraisals showed the reasonable rates of depreciation on the different equipment in our plants. So far as these appraisals were concerned, and which we based upon the Coats and Burchard appraisals, we depreciated our plant property. In that case I took the Coats and Burchard depreciations, but apparently we did not use them. We did not use their basis for depreciation, but put their depreciation value on our books. We simply used our best judgment as to what the depreciation would be and placed on it for the year 1916 the figure of $100,000.00. I think these appraisal values had a very decided relation to the value of our plants on March 1, 1913. It so happens that the values of almost everything,—building, building construction and everything that goes into a plant—was practically the same on March 1, 1913, as it was in November and December, 1915, and when this matter came up and I investigated that I found that was the fact and I asked Mr. Forward to give us the March 1, 1913, value of our plants by these appraisals less the additions between March 1, 1913, and the time of the appraisals, and owing to that peculiar condition, I regard these appraisals just as efficient for March 1, 1913, as if they had been made at that time. It is my experience in our

particular line of work that the cost of materials were exactly the same, or about the same, on March 1, 1913, as they were in November, 1915, and February, 1916. It is not only my opinion, but it is confirmed by the United States Department Bureau of Labor Statistics, the figures of which I have here. We sold our materials substantially about the same price in 1915 and 1916 as about March 1, 1913. Costs of materials were the same. We are very large buyers of iron, steel, rails, pig iron, and various things, and the prices were almost identical. Our sales prices were substantially the same as in March, 1913. There were variations at times, due to other causes than value of materials. The war in Europe practically made no difference whatsoever in these costs at that time. That was the result of my investigation, and I recently got hold of this Government
55 book, which confirms everything I have said. The greater activity in our plant was due to the war in Europe; was due to the fact that the United States had entered into the war. Prior to 1918 it was due to the European war and the greater activity not only by reason of the foreign countries being at war but our country being at war. The greater activity which I have testified about in our plants was in 1917 and 1918. We supplied various things. One of our principal parts are brake beams for railroad cars. We supply reinforced concrete bars for building construction from our Franklin plant and in our malleable plants we make a general line of malleable castings. The increased activity, as regards the time the plants were running, during those years was 100% in 1917 in one of our plants over 1915 and 50% over 1916. Substantially the same ratio in other plants. The increase is in tons. I have no information before me which will tell how many hours per day we worked in our plants more in 1917 and 1918 than we did in the ordinary course of our business in prior years. The amount of tonnage is one source of my information, and my general knowledge and recollection. When you ask about increased hours, I do not have details about them. I would have general knowledge of the increased hours that our plants worked at the time, but I do not remember things, carry in my mind, as I did when I was younger. None of our plants ever worked twenty-four hours a day, not even during the years 1917 and 1918. It is not our practice to run our particular plants except at Franklin, and we undoubtedly had at that time what we call a night shift. It would be a substantial necessity that would make us work double crew. When I testified there would be an increase of 50% of depreciation, I based it upon the general consideration of the situation at that time. The rush to get work out. The more we paid labor, the less we got from it; the more careless they got, and many times I cannot exactly enumerate. All of our plants were running ten hours, but whether they were running overtime at that particular time I do not at this moment recall, except the Franklin plant. Ten hours prior to 1917 was the usual amount of hours worked in

a day. That was an average when we were doing a fair business. I have no personal recollection at this moment of the amount of money expended by our company in the different plants for repairs during these years, but all of those things are done under my direction and come under my observation. During those years it
56 has generally been our practice to keep our plants in a pretty
high state of efficiency by making repairs where necessary.

At the time we charged off the St. Louis Car Company item of $1,100.00 the corporation was still in existence. I do not think it had gone in to the hands of a receiver or into bankruptcy. I have forgotten the details, but that debt was represented by stock they gave us; at that time the stock was valued at about fifty cents. The $1,100.00 represents stock of the St. Louis Car Company held by the Company Railway Equipment Company, and the corporation was in existence at the time it was charged off December 31, 1918.

I recall the consideration which entered in my mind when I charged off in 1918 the account of the Superba Manufacturing Company of $1,396.46. The account had been standing for twenty-three months and it had been in the hands of our lawyers for a long time. We had no returns and there did not seem to be any hope of returns. I do not remember whether we had a lawyer's report or not, nor do I recollect what line of business the Superba Manufacturing Company was in. That was the debt of one of our other plants. It was under my instructions they were charged off, but it was on request and almost demand of Prince, Waterhouse Company who were auditing our books. We apparently recovered something from the Superba Manufacturing Company afterwards. I do not remember the detail, but there was something in 1919. The memorandum which I hold shows that we recovered $1,238.45 of the Superba Manufacturing Company in 1919. My opinion did not prove correct that the debt was bad on December 31, 1918, but it was so decided at that time. It had been running for twenty-three months and no hope of return. We usually give a thirty or sixty days credit. Our accounts are not all collected in thirty or sixty days, but if they are overdue by thirty or sixty days we then immediately try to make the collection and see what we can get. I do not specially remember what was done by our branch office to collect this debt. They reported they had taken some steps and had not succeeded in collecting any of the debt. When it came up in 1918, about twenty-three months after, we were advised that the debt should be charged off by our auditors, Price, Waterhouse & Company and I gave their advice very careful consideration, because if we did not they would make an exception in the certification of our balance sheet. The fact that our accountants might make an exception
57 in the certification of our balance sheet would not influence me
in charging off what I did not think should be charged off. Price, Waterhouse & Company did sometimes recommend that we charge off a bad debt which I did not authorize to be charged off.

Whether they would make exceptions would depend very much upon the amount. Manifestly a company of our assets with a bad debt of a few hundred dollars, that would be immaterial.

I do not remember in detail what steps were taken to obtain the money from the Lawson Construction Company, who owed us $2,000.54 on December 31, 1918. At this moment I do not know whether they were still in existence. The fact that we had recoveries of $491.82 would not necessarily mean that they were in existence and doing business on December 31, 1918; they might be in bankruptcy. That amount of $491.82 was received sometime in 1919. I do not at this moment recall whether is was a compromise settlement or result of bankruptcy. All of these things I have known, but have not charged my mind. It is a fact that we did subsequently recover $491.82 on that account. At the time we charged off $18,217.78 of the Smith Motor Truck Company, they were in bankruptcy and a hopeless proposition. I can not state positively whether they were in the hands of a receiver or bankruptcy court on December 31, 1918. I went into those matters very thoroughly at the time. Seven years nearly have passed and my mind has not retained the details of things that occurred at that time, except to say that with the very best judgment that I could use it was done. I am not positive from what source we received $3,252.54 on account of the Smith Motor Truck Company. I am reasonably sure it came from the bankruptcy proceeding, part in 1919 and some in 1921. To the best of my recollection the Smith Motor Truck Company was in the hands of a receiver or a bankruptcy court. There was very little hope on December 31, 1918, some money might be recovered from this account through a trustee in bankruptcy, if it was in the hands of a trustee. No human being can tell what will happen in the future and that there was a small recovery there was not within the reasonable judgment of a man at that time. The fact that the company had gone into the hands of a trustee would not alone cause me to charge off an account. The company may have considerable assets, but at that time this company did not have sufficient to pay anything in my judgment. We recovered $3,200.00 out of $18,000.00.

I do not recall anything about the Star Specialty Company
58 account. There were no recoveries on that account by the
end of 1918. I do not know whether it was in existence at
that time. Can not recall from whom we recovered or whether anything was recovered from the receiver or trustee in bankruptcy. I know a great deal about the Maxfer Truck Company. It owed us about $20,000.00 on December 31, 1918. As I testified on direct examination, I was on the creditors' committee and you could have had that account for ten cents on the dollar and they owed us $20,000.00 During 1918, under most extraordinary circumstances which I do not think has been equalled in the annals in bankruptcy, we got a sum which left a balance of $6,000.00. I was on the creditors' com-

mittee in 1917, and by the time they paid this unusual amount I did not see how it was possible for them to pay anything more. We ought to erect a monument to Smith. My connection with the creditors' committee did not have anything to do with $6,000.00. The creditors' committee was in 1917 and I do not remember positively, but I know they threatened to put the company into the hands of a trustee. I do not remember the details afterwards, but what Smith did with that company was long after the creditors' committee and was during 1918. He made these extraordinary payments so that at the end of '18 if there was ever an account that I thought was hopeless, that $6,000.00 appeared to be so. Smith was put in charge of Maxfer Truck Company. I think he was elected president and he operated through the Fort Dearborn Bank with their cooperation, and gathered together all of this miscellaneous stuff, as I call it, chips and whetstones and I don't know how he did it, but he did it. The fact that he had collected $13,000.00 or $14,000.00 out of the $20,000.00 made that $6,000.00 look doubly hopeless. He had gone further than I dreamed he could. My mind has been refreshed that the Maxfer Truck Company was in the hands of a receiver in 1918. The fact that is was in the hands of a receiver and in the hands of a bankruptcy court did not make any difference to me about writing off that $6,000.00. The fact that an account is in the hands of a Receiver is not sufficient in itself to warrant the writing off of an account. A concern might be in the hands of a receiver and pay out one hundred cents on the dollar. That depends upon the assets and to some extent the manner in which the receivership in handled. I know of no fixed rule by which you can determine that. I have had cases which were in the hands of a
59 receiver and we did not charge it off because we believed
the situation was such that they could get out of receivership. At no time do we ever charge anything off the books unless we think it is fully and amply justified and that decision is based on a thorough investigation of each case. We did subsequently in 1920 recover on the Maxfer Truck Company $2,466.20. I do not remember just the person it came from. I do not recall whether it was from the Receiver or Trustee. It came through Mr. Oppenheim, and I did not ask him where he got it, except we commented in a general way upon the extraordinary performance of our friend Smith.

Redirect examination:

We were operating our plants in the year 1917, 1918, and 1919 to their full capacity. In 1917, for instance, we operated 100 per cent more than in 1916. About the same in the other plants. There is always a normal growth, I should say, that would substantially apply. There was a difference between the operation during those years and the use of our machine and appliances during normal years. This, as I have stated, was due to hurried conditions, careless labor and inefficient labor.

W. A. Forward, a witness for the taxpayer, being first duly sworn, was examined by Mr. Oppenheim:

My name is W. A. Forward. I am auditor for the Chicago Railway Equipment Company and I have been connected with the company since 1906. I was first employed at the Marion, Indiana, plant in 1906. I went into their service immediately upon the acquisition of the property, in the capacity of auditor, for the plants at Marion, Indiana, and Grand Rapids, Michigan. In 1908 I went to Chicago as general auditor. My duties were to audit all receipts and disbursements in a general way. I was familiar with the moneys that were paid out by the company and the properties which they were buying. I made visits to the two foundries and rolling mill on an average of once a month during the year. Was at the Chicago plant the balance of the time, except two or three trips that I made to the Detroit plant. The main plant is at Chicago, Illinois.
60 It was a regular plant and office building. The office building was three stories. The plant at Marion, Indiana, was a malleable iron foundry and so was the one at Grand Rapids, Michigan, and at Franklin the plant was a rolling mill, and in 1913 or 1914 the brake beam shop was built there. The Detroit plant was a brake beam shop, except during the war we were turning out munitions and making shells. There was an abandoned plant at Chicago situated at 4060 Princeton Avenue, which is used as a warehouse. It was leased to a tenant after the equipment company moved to its new plant at 46th and Robey Streets. The Princeton Avenue property was acquired about 1893. I was not with them at that time, but I think it was in '93. It is a one-story brick building and composition roof.

Mr. Oppenheim. Do you know what the original cost of that building was?

Mr. Mitchell. I object to that on the ground that the testimony which it sought to be produced is not the best evidence. The records themselves should be produced.

Mr. Trussell. The question was only whether or not he knows. Do you know?

Mr. Mitchell. I am making the objection on the ground that it is a violation of the best evidence. This witness is now professing to testify about purchases made in 1893 and long before he had become connected with the company. There is the same objection that he gets his information from the books.

Mr. Trussell. Not always; he gets it from somewhere. What is the source of your information, Mr. Forward?

The Witness. The records of the company. We had the accounts in an old ledger that was used that shows the cost of the different buildings.

Mr. Trussell. Where is that ledger?

The Witness. In Chicago.

Mr. Oppenheim. Have you the book here in which that has been carried forward? The amount?

The Witness. Not as a separate item.

Mr. Trussell. Do the books you have here show the amount of the whole cost of the plant that has been carried forward, but not in the original items themselves?

The Witness. No; it is segregated in one general property account; that is all of these different plants are in one general property account in the ledger we have here. This that I propose to testify about is all in there, but it is not shown under the separate items.

61 Mr. Littleton. Not segregated?

The Witness. No, it is in one account.

Mr. Trussell. The division is of the opinion that the witness' testimony as to the original cost is of such a character that it can not be taken as proof of the cost. However, the witness can testify as to what he knows about it so that the matter will be in the record for the purpose of making the record to the extent that the taxpayer offers it on that part.

The Witness. The original cost of that building was approximately $26,000.00. The Detroit plant was built in 1901 and 1904. Its cost was approximately $140,000.00. The Chicago Plant was erected in 1907. Its cost was approximately $280,000.00. I have not the exact figures. That includes the machinery as well. There was paid $62,500.00 for the Grand Rapids Plant. That included the plant building and equipment. There was no segregation as to the values of the buildings and equipment separate from the plant.

Q. Do you know the value of the land at Grand Rapids at the time it was bought?

Mr. Mitchell. I object to the question as calling for a conclusion of the witness.

Mr. Trussell. The objection is overruled.

The Witness. We valued the land at Grand Rapids at $7,500.00. By "we" I mean the Chicago Railway Equipment Co. We had an appraisal of the property at Marion about the time it was purchased; that was in 1906. This appraisal of the buildings, equipment, including machinery in factory, was approximately $130,000.00. The company paid $97,000.00 for the Marion plant. The value of the land separate from the plant was $5,000.00 At the time these plants were purchased by the Chicago Railway Equipment Co., the Grand Rapids plant was not in operation. The one at Marion was operating, but not full. The Grand Rapids plant was in the hands of a creditors' committee, as I understand it. The appraisal of approximately $185,000.00 for the Marion plant was made the same year that they acquired it—1907. These amounts were put on the books of the company after the appraisal was made; that is, when the books were closed for the year; they were put on in 1908. When the Franklin plant was acquired, it was operated by a receiver. The Chicago Railway Equipment Co. paid approximately $175,000.00 for the Franklin plant. It was acquired in 1912.

There was a fire at the Franklin plant in April, 1913. Part of the 18" mill building and a part of the brake beam shop was left 62 after this fire. We had an appraisal of the Franklin plant in 1915 by the Coats and Burchard Company. I first saw this appraisal in January. 1916, shortly after it was made by the men of Coats and Burchard Co. The appraisal was made as near the end of the year as was practicable so that we could get the value up to the time for the closing of the books in 1915. I was conversant with the Franklin Rolling Mill Plant. The map on the last page of the appraisal book is a correct map of the plant as it existed in 1913. I have examined the appraisal of this plant made in 1915 and to the best of my knowledge it is a correct and complete inventory of the property which the Chicago Railway Equipment Co. had in 1915, when this appraisal was made. I was familiar with the property there, visited it frequently and I knew that the larger items in there were correct. I think the figures contained in this book are correct. The amount is stated at $493.885.89.

Mr. Oppenheim. In the summary of the property, the general supplies, what is the value shown for the buildings?

Mr. Mitchell. I object to this as incompetent, irrelevant, and immaterial. This appraisal has not been authenticated in any way whatsoever, nor has it been shown that the witness had anything to do with the making up of this appraisal and I do not believe the witness is competent to testify from this book or knew anything about the book until this case arose.

Mr. Trussel. The witness has testified that the taxpayer employed an appraisal company to make an inventory and appraisal and this is the result of the work which was authorized to be done by the taxpayer and it was taken in on their books.

The objection is overruled.

The Witness. The value of the building as shown by the summary is $163.742.02; that is the reproductive value. And the buildings were steel frame work, with concrete, iron sides and roof, with the exception of the brake beam plant which was brick.

Mr. Oppenheim. Mr. Forward, what is the normal, useful life of such a steel and corrugated iron structure?

Mr. Mitchell. I object to that as a conclusion. The witness was not shown to have expert knowledge.

Mr. Trussel. It is overruled.

The Witness. I should say it has a life of perhaps twenty years, with a depreciation of 5%. Of this $163.000.00, $140.000.00 is the corrugated iron building and the remainder brick 63 and concrete.

Q. Now, we will turn over a few pages to the safety and appliance machinery, hangers, belting, tools, machinery, and equipment, including frames, forges, and various railway foundry equipment, trucks, and scales. What was the reasonable percentage of depreciation on such articles for the year?

Mr. Mitchell. I object.

Mr. Oppenheimer. What is the normal life, if you life?

Mr. Mitchell. I object as calling for a conclusion from the witness, who has not been shown to have expert knowledge. May it please the board, I do not like to be put in the position of delaying the hearing, but it seems to me I must make the usual objections for the record.

Mr. Trussel. All right, the objection is overruled.

The Witness. An average of ten years.

Q. Now, as a matter of fact, Mr. Forward, what was the average life of the rolls?

Mr. Mitchell. I object to that as calling for a conclusion of the witness when it has not been shown that he has any expert knowledge.

Mr. Trussel. Overruled.

The Witness. The life of rolls depends upon the amount of business we can get from that particular set of rolls. If a roll is used constantly, it will not last more than one year. If it is not used—if we do not get orders—the life of it may be five or six years or may be ten years. The value of the rolls at the Franklin plant was $35,000.00. The life of a bench depends again on the amount of business we get and the work put on these articles. I should say the average life is about ten years. Furnaces have to be repaired more or less all the time and they have to have a general overhauling every five or six years. During the years 1917, 1918, and 1919 practically all the equipment was used in handling Government orders. The Government was running the railroads at that time and the railroad equipment was for governmental purposes and we were working under considerable pressure to get this stuff out. There was greater tonnage during these years than in normal times.

Mr. Mitchell. I object to that as secondary evidence.

Mr. Trussel. That is overruled.

The Witness. During the three years preceding the years men-
tioned—that is, 1917, 1918, and 1919—we shipped approxi-
64 mately 125,000 tons, and during the three war years we
shipped about 175,000 tons, or approximately 50% more.

Mr. Oppenheim. What effect did that have on the machinery in the way of deterioration and depreciation?

Mr. Mitchell. I object to that as calling for a conclusion from the witness.

Mr. Trussell. Overruled.

The Witness. That naturally meant a shorter life of the equipment. The normal useful life of this equipment during the years 1917, 1918, and 1919 was seven years.

The appraisal book was offered in evidence.

Mr. Mitchell. I object to that as incompetent.

Mr. Trussell. The objection is overruled and it will be received as taxpayer's Exhibit No. 1.

The Witness. The book you hand me is an appraisal of the Chicago plant. The map in the back of the book is a correct diagram of the plant as it existed in 1913 and 1915. It consisted of the office building and the assembling plant and brake-beam plant. I have gone over the appraisal as I stated I did of the Franklin plant, and it is correct. To the best of my knowledge, the values as stated in this book seem to be the true, reproductive values of the plant as of 1915. There was no difference in values in building cost between 1913 and 1915. I have a book from the Department of Labor showing cost during the years 1913, 1914, and 1915, and it shows practically no difference between 1913 and 1915. If anything, the cost in 1915 is a little less than in 1913.

The reproductive value of the Chicago plant is $182,762.09, and of the machinery, tools, and equipment $162,000.00, making a total of $344,762.09. The original cost of these buildings was about $8,000.00 more than the appraisal figures; that is, the company expended in erecting these buildings in 1907 and 1908 $8,000.00 more than the appraisal of Coats and Burchard Company. The difference between the appraisal made by Coats and Burchard and the cost to the company of the Franklin brake-beam plant when erected in 1913 was less than $10,000.00 difference as I recall it.

The appraisal book of the Chicago plant is offered in evidence.

Mr. MITCHELL. I object to it as incompetent, irrelevant, and immaterial.

Mr. TRUSSELL. The objection is overruled and that will be received as taxpayer's Exhibit No. 2.

65 The WITNESS. The book shown me, marked "Detroit" is the appraisal of the Detroit plant made late in 1915. The map contained on the last page of this book is a correct representation of the plant as it existed in 1915 and 1913. The buildings were appraised by Coats and Burchard at $49,937.27 and machinery and equipment at $107,000.00, making a total of $156,185.39. That I believe to be a correct compilation of property held by the Equipment Company in 1915 at the time this appraisal was made. The footings are correct.

(Book offered in evidence. Objected to by commissioner's counsel as incompetent, irrelavent, and immaterial. Objection overruled and book received in evidence as taxpayer's Exhibit No. 3.)

The book shown me, bearing upon its title page the words "Grand Rapids," is Coats and Burchard's appraisal of the Grand Rapids plant in 1915. The map on the last page of this book is a correct representation of the buildings as they were in 1915. There was no material change between 1913 and 1915. The plant was practically rebuilt in 1906 and 1907. I have examined this appraisal and am familiar with it. The value of the buildings of the Grand Rapids plant as shown by the appraisal was $143,568.37 and correctly represents the reproductive costs of the buildings in 1913. The total cost of the plant is $354,814.07. The Chicago Railway Equipment Company had the particular property mentioned in this appraisal at the time it was made, and in my judgment that is the reproductive values of these properties.

(The appraisal book of the Grand Rapids plant offered in evidence, objected to by the commissioner's counsel as incompetent, irrelevant, and immaterial; objection overruled and book was received in evidence as taxpayer's Exhibit No. 4.)

The book you show me is the Coats and Burchard appraisal of the Marion, Indiana, plant. The map on the last page of this book is a correct representation of the Marion plant. The plant was acquired in 1906. I was familiar with it as I was employed at the plant at the time the Chicago Railway Equipment Company took it over. The book of appraisal contains a true and correct description of the property of the Chicago Railway Equipment Company at Marion as I believe. The footings as to the value of the buildings, equip-
66 ment, machinery, etc., are correct. The reproductive value of the buildings as shown by this book is $157,366.75 and that was the correct reproductive value of the plant in my judgment, and the same values for the year 1913. The total value was $333,455.38 and the value of the tools and equipment would be the difference between that and the building value. I believe that to be the correct reproductive value of that property at that time. The value of this property on the first day of February, 1913, was approximately the same as that at the time of the appraisal.

(The appraisal book of the Marion plant was offered in evidence, objected to by the commissioner's solicitor as incompetent, irrelevant, and immaterial and objection overruled, and book received in evidence as taxpayer's Exhibit No. 5.)

The Coats and Burchard of the Chicago Company's warehouse at 40th and Princeton Avenue has a depreciation summary. That was the plant that was formerly used as a brake-beam plant and abandoned when we went to the 46th Street property, and was occupied by a lessee. In 1915 its reproduction value was $37,942.97 and such was its reproductive value on March 1, 1913.

(Book offered in evidence and objected to as incompetent, irrelevant, and immaterial by the commissioner's solicitor. Objection overruled; book received as taxpayer's Exhibit No. 6.)

These several appraisals were received by the Chicago Railway Equipment Company in January, 1916, and have ever since remained in its office at Chicago as part of the records of the company. In closing the books of the company in 1915 we entered these valuations on the books as the value of the property. I have the ledger of the company showing this fact. This ledger covers the period from 1912 to 1917.

Mr. Oppenheim. If your honor please, I would like if I could, to get this in evidence, to get these facts in without the introduction of the book; if Mr. Mitchell can agree with me. This is a part of the company's books, and we prefer not to leave it.

Mr. Mitchell. I will agree to allowing this witness to testify to any particular figures shown in the book.

The **Witness**. The valuation as shown by these appraisals placed on the books of the company as shown in the ledger which has been handed me was entered as of December 31, 1915. As a matter of fact, the entries were probably made in February, 1916. The
67 entry in regard to these valuations of the plant and equipment shows $2,800,549.77, but in that figure is included $283,000 of real estate which should be deducted as nondepreciating property.

Mr. **Littleton**. Land?

The **Witness**. Yes. That entry has been carried forward by the company up to the present time. We entered depreciation against these properties for each year. That is, we credited the depreciation reserve. We carried these values at all times and as against them we had a depreciation account. The depreciation account for the years 1917, 1918, and 1919 which we returned to the Government was $150,000.00 for each year, and we have taken $150,000.00 depreciation upon our plant and equipment for each year up to the present time. I have drawn up a statement from our books in which I have segregated the buildings, power, and machinery. I can give you what that is of March 1, 1913.

Mr. **Mitchell**. I object to the question on the ground that it is a violation of the best evidence and is testimony from a summary when the books, which are the best evidence, have not been produced.

Mr. **Oppenheim**. We have introduced all the footings and I want to know if the witness knows what this amount consists of, how much of it is buildings and how much of it is machinery, and how much of it is power, etc.

Mr. **Trussell**. That is in reference to the totals?

Mr. **Oppenheim**. It is.

Mr. **Trussell**. Objection is overruled.

The **Witness**. On March 1, 1913, the Chicago Railway Equipment Company had a value in—

Brick buildings	$561,019.39
Steel & iron buildings	78,489.31
Power	87,366.59
Equipment	811,940.84
Patterns	43,665.09
Automobiles	3,345.09

Additions have been made to the buildings and equipment since that time.

Q. Will you please state how much has been added to the buildings, cost and when?

Mr. **Mitchell**. I object to that as calling for secondary evidence.

Mr. **Trussell**. Overruled.

68 The **Witness**. In 1913 we added as follows:

To brick building	$20,734.63
To steel and iron buildings	2,116.18
Power	7,416.59
Equipment	31,426.25
Patterns	2,183.74
Automobiles	635.00

In the same year we deducted on account of a fire the following amounts:

From brick buildings	$7,603.14
Steel buildings	31,091.14
Power	8,745.50
Equipment	83,836.56

Mr. **Oppenheim.** What was that on account of?

The **Witness.** The Franklin fire, and in 1914 we added as follows:

Brick buildings	$13,501.56
Steel and iron buildings	92,553.08
Power	19,345.76
Equipment	117,575.27
Patterns	3,248.01

In 1915 we added as follows:

Steel and iron buildings	$2,359.01
Equipment	11,535.36
Patterns	1,505.40

In 1916 we added as follows:

Brick building	$18,738.53
Power	9,723.36
Equipment	27,351.14
Patterns	3,487.27

1917 as follows:

Brick building	$23,064.53
Equipment	33,938 34

That left a depreciated value on January—December 31, 1917 which is the first taxable year as follows:

On brick buildings	$629,455.41
On steel and iron buildings	144,425.44
Power	115,376.71
On equipment	994,036.86
On patterns	26,467.82
On automobiles	2,750.00

a total of $1,868,809.04.

69 I include in power the boiler and engines. The commissioner in his deficiency letter states the power in rough numbers at $355,000.00. I do not know what property he included in order to make up that sum. It must have been items we have in equipment. The power in my judgment has a normal, useful life of about twenty years; that is a five per cent depreciation, and machinery and equipment has a ten per cent depreciation. In my judgment, during the years 1917, 1918, and 1919, on account of the excessive large tonnage we should be allowed an extra amount of depreciation for those three years.

Q. What is your judgment as to the fair depreciation for the years 1917, 1918, and 1919 on machinery and tools?

Mr. **Mitchell.** I object to that as calling for a conclusion on the part of the witness, who has not been shown to have any expert knowledge.

Mr. **Trussell.** Overruled.

The WITNESS. I think half again as large depreciation would make about right in view of the extraordinary conditions under which we were operating. The loss of good men in the service, the unrest that was among employes at that time, the changes that were going on in the labor turnover, which was very large, and the trouble we had in getting supplies, repair parts, due to the congestion of the railroads. I mean 15% depreciation instead of 10%.

I had charge of all the accounts of the company and the accounts that I thought necessary were brought to the attention of the company's officers for action. I know the accounts that were charged off and disallowed by the commissioner. I have a list of them. The values which I gave you heretofore were the reproductive values and not the depreciated values. I estimate that the depreciation accruing on brick buildings on March 1, 1913, was, in round numbers, $41,000.00; on the iron and steel buildings, $2,000.00; on the power, $11,000.00; and equipment, $77,000.00. The first item of bad debts charged off and disallowed by the commissioner is $9,000.00 of Pittsburgh-Hicks & Company. This debt was contracted in June, 1917, and the company received one payment on account, $1,000.00, between June, 1917, and December, 1918, at which time the account was considered bad and written off. The note was a thirty-day note. The account had originated in March, 1917. We received on this account $800.00 in 1920 and $161.82 in 1921. These sums were reported in our income returns for the years in which they were received. The construction company had an open account contracted from April 11, 1917, to May 28, 1917. We received no payments after July, 1917, and at the end of 1918 it was written off as bad. In 1919 we received $491.82, which was reported for income for that year. The debtor was in bankruptcy. I do not remember when they were adjudicated bankrupt. I personally made no investigations of this account, as I was not with the company at that time. I was in the Army. I know the company tried the best it could to collect the account and that Price, Waterhouse & Company, who audited the books and records, recommended that it be written off. No, nothing was received on the stock of the St. Louis Car Company, representing $1,100.00, and it was written off. No dividends were ever received on the stock. That company is still in existence. The Superba Company account was a note given on February 10, 1917. No payment was made on it up to the end of 1918 and it was written off. There was collected $1,238.45 in 1919, which is returned as income for that year. The Maxfer Truck Company consisted of $6,000.00 of notes. This was written off. The company was operated by a creditors' committee and they owed us something like $20,000.00. This was reduced to $6,000.00 and they failed to make any more payments. The corporation was thrown into the hands of receivers by the bankruptcy court at Chicago in 1918. Our company was one of the creditors' committee. We subsequently received $2,466.30 in 1920, which was reported as income for that year.

The Smith Motor Truck Company was an account contracted for in 1917, from June to August, and that concern was handled by a creditors' committee for a while and it was thrown into bankruptcy. No payments were made at the end of 1918 and it was considered bad and written off. There was a collection of $2,937.14 in 1917, and $317.40 in 1921. These amounts were returned to the Government as income for those years. There was an open account of $2,300.25 of the Star Specialty Company contracted in March and February, 1917. No payments were made and it was written off. In 1919 we received $1,145.35, and this was returned as income for that year.

Cross-examination by Mr. Mitchell:

The entries for the charging off of these accounts were not made until some time in January or February. I assume that the
71 entries were made as soon after December 31, 1918, as possible.

I have testified that we received payments on account of the notes, with the exception of the St. Louis Car Company stock. In each of the six instances the president of the company determined that the notes and accounts were worthless at the end of 1918. Later developments showed that some of the accounts were collected, but I do not think that would indicate that the account were good. I was in the Army in 1918; was in the Army for two years; went in in August, 1917, and came out in July, 1919. I had no personal knowledge of these accounts during that time. Everything I know about the accounts I learned after my return from the Army. This information was acquired from the records of the company at the time the department was making their audit. My information was acquired solely from the records of the company; by this I mean the correspondence and records and such as that. I was with the Malleable Iron Works in 1906 when the taxpayer bought it; I went into its employ at that time. I was then auditor for the Marion malleable plant and the Grand Rapids plant. I was auditor for those two plants from 1906 to 1907 and was then transferred to Chicago, and in 1909 became general auditor for all the plants, and have been general auditor ever since, except when I was in the Army. I have been connected continuously with taxpayer since 1906, except during the time I was in the Army. My duties are such as usually follow an auditor who has control of and charge of accounts and records of a company. I have charge of the accounting records and am responsible for that branch of the work. It keeps me comparatively busy. The testimony I gave as to the cost of the Detroit plant in 1901 and 1904 was taken off of the ledger of the equipment company, and the same is true as to my information as to the cost of the different plants. All the figures in that connection which I have testified to before the board were taken from the records of the company. The information about the appraisal of the Grand Rapids plant in 1906 I got from the appraisal itself. I do not know what a 16″ celluloid angle, referred to on page 165 of taxpayer's Exhibit No. 1 is. I said

that to the best of my belief the appraisal was a correct valuation of what was shown there. I have no idea of the value of that particular item in 1913. My belief is that at the time that appraisal was made we had that article in our possession and that it was worth the amount that was shown on the book. My knowledge of
72 the plant enables me to decide that the appraisal was approximately correct. I know what a louver is. It is part of a roof of a building. I have an idea in regard to the value of 11 inch by 20 feet #20 galvanized-iron louver and its value on March 1, 1913. I can figure the number of square feet and square yards and determine approximately what it would cost. That appears in connection with the purlin. I know the value of a purlin in 1917. It is a beam, and the price of steel beams is established, so that you can easily find out what that was. I would find out what was the value of a 16 x 16 feet by 6 feet purlin in 1913 by going back and finding what the value of steel was in 1913 and figure that out before I could give it to you. I never attempted to make an independent appraisal of my own in any of these plants. I would not say that I have not appraised articles in these plants, because we have had at different times to inventory certain items like flasks and inventory the rolls at the rolling mills. In appraising this kind of property I would have a man in charge of the particular item that we wanted to get a record of show us the amount, and I would put the value and the figures on. I have not made any independent appraisal of any property other than on certain items in the plant. I can not recall anything further than rolls and certain flasks that I have personally appraised. My experience in appraising certain kinds of property would be very limited, but I think I know what the value of the property was. I would not say that I have any experience as an appraiser, even with rolls and flasks. While I have made appraisals of rolls and flasks I would not set myself up as a public appraiser because I have made a few appraisals of property. I have set myself up as an expert appraiser of rolls and flasks of our own property, but not as a public appraiser. My only experience in appraising is just our own; that is, at times we have wanted to know what the value of rolls were; and, as I say, I had the man in charge give me the number of rolls, and I went to the invoices and found out what the prices were, and especially the value of the rolls at different times. I have done this three or four times. My experience in appraising flasks is about the same.

I have figured depreciation rates on property ever since I have been with the company; on its own property. I have made estimates of depreciation during all these years. I use it in our costs. I computed depreciation on all the different items of our property. I was not with the company in 1917 and 1918 at the time of the closing of
73 the books, but during 1919 I was there and took care of the determination of depreciation by our company during that year. I determined that the depreciation for that year was

$150,000.00. In coming to that determination I divided the property in general classes and figured depreciation and then take a round sum which was closest to that figure. The figure of $150,000.00 was based upon detailed computation. I use the round figure instead of the exact figures because I think the round figure is much more exact than audit figures, as where you take a list, for instance, of a piece of machinery which is listed at a cost of $135 and the depreciation is ten per cent; instead of taking $1.35, ascertaining the round figure, if the figure was $1.50 or $1.25 or $1.00, because you are unable to say just exactly what the exact amount is on a piece of machinery, the depreciation, and the same is true with the whole plant, so if you take a depreciation of $161,911.23, or whatever the figure is, it seems to me it is more reasonable to say that the $150,000.00 is the correct amount for the whole plant. I personally made the detailed statement of depreciation for 1919. Did all the work myself. I depreciated the machinery by 7% and the buildings about 5%. I do not have with me the detailed statement for the various years. I would say that the rate on the building was 5%; that to my best recollection is the rate I used in making the detailed statement. I used 7½% on the power plant, 20% on automobiles, and either 20 or 25% on patterns. I made up a statement of depreciation for the year 1916; that was $100,000.00 in round figures. I made up a detailed statement on which the $100,000.00 was based. The rate of depreciation on the buildings for that year was 3%; on the power plant 5%; on machinery and tools 10%; 20% on automobiles and 20 or 25%, I think, on patterns. A pattern is not dependent upon the wear so much as it is in becoming obsolete in design. A pattern is a model from which moulds are made in which the castings come. We produce castings at the malleable plant, a great part of which are shipped to Chicago for use at the break-beam plant. At the rolling mill we produce bars and rolls which are shipped to Chicago to use in the break-beam plant and at Chicago we assemble these castings, rolls, bars, and other articles. Finally they become obsolete. Some of them are used and left lying around, but due to changes which we have, such as changes in hangers, we have some little changes, we have to get out another pattern and so the article becomes obsolete and in a great many instances it is necessary to make up others.

74 I testified yesterday that in my opinion there should be a 50% increase over normal rates of depreciation for the years 1917, 1918, and 1919. My opinion after observing conditions around the taxpayer's different plants were for the first half of 1917 and the last half of 1919. During the intervening period I was in the Army. The basis of my opinion that normal depreciation should be increased 50% is that the company was forced to increase its production very materially and the well-known unsatisfactory condition of labor and supplies were of such a nature that it would indicate that the plant would wear out much more quickly under those conditions. I base my opinion on a comparison between the

years 1914, 1915, and 1916 and the years 1917, 1918, and 1919. As I stated yesterday, that our total output for the three years of 1914, 1915, and 1916 was 125,000 tons and that for the three years 1917, 1918, and 1919 the total output was approximately 175,000 tons. I have records at the hotel which will show exactly what the output was during those years, but not here. The unsatisfactory condition as to supplies was owing to the rushed conditions that most of the industries in the country were under at that time. It was pretty hard to get materials and repair parts for machinery. The railroads were very congested and deliveries were uncertain. Our company managed to keep up its repairs during the period of 1917, 1918, and 1919 in a normal way. It has been the policy of our company during the period of its existence to make ordinary repairs. I would say that during the period of 1917, 1918, and 1919, the general wear and tear on the whole plant was increased. I think the depreciation on buildings would be increased. The buildings were naturally affected by the machinery in them. The machinery was not properly handled, due to inefficient labor that we had. I learned this after I came back to the company and from the general situation that existed. The operations of our company during that time indicated inefficiency. If we had had the same class of high-grade labor that we had prior to the war, we would have been able to turn out a larger production at a less cost. I base this upon my knowledge of the situation. I have not seen any figures nor made any investigation to find out whether the output per man increased or decreased during that period. I know that the labor turn-over was very large and under those conditions the output always decreases. I would say that the output
per man decreased. My answer is not based upon any calcu-
75 lations that I have prepared; it is merely a general impres-
sion. The number of employes were increased during 1917, 1918, and 1919 as compared with the prior period of 1914, 1915, and 1916, but I can not say approximately what per cent. In comparing the use of machinery and the hours per day during the war period as compared with the period of 1914, 1915, and 1916, we operated some night shifts, but as a general thing we maintained the usual hours per week, and the usual hours were fifty. During the war period, as a general thing we operated fifty hours a week. We ran some night shifts at Franklin and also at the Detroit plant on munition. I do not know exactly what percentage of the time we operated night shifts, but would say it was very small. Our output during the war period was greater than during the previous three years, and our equipment was greater. We did not make extensive expenditures for additions to our plant nor equipment during the years 1917, 1918, and 1919. These additions are shown in the figures which I reported yesterday. I have a memorandum of those figures. In 1917 we added $23,000.00 worth of buildings and $33,000.00 worth of equipment. In 1918

we added $26,000.00 worth of buildings, $21,000.00 worth of equipment and we sold $23,000.00 worth of machinery. In 1919 we added $19,000.00 worth of buildings and $13,000.00 worth of equipment. The total for these three years approximated $112,000.00 net in the plant and equipment. I base my idea that there should be an accelerated depreciation during the war period of 1917, 1918, and 1919 on a comparison between 1914, 1915, and 1916. The output for 1914, 1915, and 1916 was not subnormal. Nineteen sixteen was one of the best years the company ever had; 1914 and 1915 were normal years. The letter you show me is a comparative statement showing the yearly investment on the books and the sales in dollars for the years and the weights. It shows the sales in pounds, in weight, and dollars. It shows a ratio between the sales in pounds and the net investment in our buildings and equipment. I prepared and submitted those figures and to the best of my knowledge they are correst. Column 7, Exhibit B, shows sales in weight, in pounds; column 4 shows the net investment in buildings and equipment; column 8 shows the ratio of column 7 to column 4. Column 8 shows the ratio between the investment and the sale in pounds. It is equivalent to showing the number of pounds sold for each dollar of
investment in buildings and equipment. I will read into the
76 record the number of pounds sold for each dollar of invest-
ment in buildings and equipment for each year for the period
shown by this exhibit, 1893 to 1916, inclusive:

1893	874 pounds.	1905	109 pounds.
1894	327 pounds.	1906	170 pounds.
1895	1,105 pounds.	1907	125 pounds.
1896	368 pounds.	1908	24 pounds.
1897	20[illegible] pounds.	1909	49 pounds.
1898	37[illegible] pounds.	1910	71 pounds.
1899	394 pounds.	1911	35 pounds.
1900	206 pounds.	1912	97 pounds.
1901	177 pounds.	1913	162 pounds.
1902	392 pounds.	1914	43 pounds.
1903	193 pounds.	1915	65 pounds.
1904	77 pounds.	1916	115 pounds.

I am familiar with the depreciation rates which the revenue agent found and the commissioner approved. I had a conference with the revenue agent after his investigation. I conferred with him at the time he was out at the plant and he told me of his depreciation rates. I agreed that they were proper rates in normal years. Those rates consisted of 3% on the buildings and 5% on the power plant; 10% on machinery, tools and equipment, furniture and fixtures. I did not agree with him on 5% on patterns, but did on 20% on automobiles. I had the most prominent part in determining the depreciation rates up to the time I went into the Army, and I also determined them for 1919. I found $100,000.00 to be a proper depreciation for 1916. Prior to 1916 we did not have any regular amount of depreciation that we charged off. There were some years that
we did not charge off any depreciation. I do not know whether
77 that was true for 1915, but do recall that in some years we

did not have any depreciation. Whenever we did have depreciation it was in some round sum. In making a depreciation for the year 1919, I took into consideration the additions which had been put on the plant during 1917, 1918, and 1919. For 1916 I found $100,000.00 and for 1919 $150,000.00. The increase from $100,000.00 to $150,000.00 was not solely on account of the abnormal conditions of the war, but the major reason. Another reason was that we had increased the plant. Our figure of $150,000.00 did represent a 50% increase of what was considered abnormal conditions. In estimating $100,000.00 as a proper rate for 1916, we used a round figure. As I recall it, the depreciation we actually figured for 1917 was $161,000.00 or $162,000.00, but we called it a round figure of $150,000.00. The returns of $100,000.00 in 1916 and $150,000.00 in 1919 do not indicate that one or the other of those years was incorrect, because it is not a definite detailed figure that our estimate in round numbers of what the depreciation on the plant was. It is my best opinion that a 3% rate on a brick and concrete building owned by the company is proper for normal years, but I think a steel and corrugated-iron building should take a higher rate—5%. The value of our brick and concrete buildings in 1913 was approximately $561,000.00 and the proper value in 1913 of our steel and corrugated-iron buildings was $78,000.00. In 1913 there was a peculiar situation. The fire at Franklin occurred in April, just a month after this March 1, 1913, value that we are concerned with, so that a large part of the plant was destroyed in the month following the date set for the establishment of this value, and then of course the plant was rebuilt in 1913 and 1914, so while that value of March 1, 1913, is accurate, those were old buildings; but before the end of the year we started to rebuild, and in 1914 they were new buildings. We had some old corrugated-iron buildings in 1913. I do not know when the oldest corrugated-iron building was erected; have no idea when; they were included in the Franklin plant when it was purchased in 1912. Our oldest corrugated-iron building was at the Franklin plant. I have no idea when it was built. I should estimate from five to ten years. Those buildings are not now in existence; they were partly burned up and then rebuilt. We have no complete corrugated-iron building that was in existence March 1, 1913. When this fire occurred at Franklin it gutted the entire plant, and part of the buildings we could use over again and
78 part we could not; so in rebuilding the plant we made use of what we could of the old buildings and then had to replace some of them new, so that the new plant is a combination of what was left of the old plant and the new plant. It is at the present time in good shape. I could not say whether they would be used up by 1931. I think the normal life of those buildings is about twenty years. I am not a prophet and cannot say that these buildings will be gone in twenty years; in seven more years I am only able to say that I think twenty years is the normal life of such buildings. The same conditions applies to the brick and concrete buildings at

Marion and Grand Rapids as applies to Franklin. We bought those plants, and I do not know that anyone knows when they were built; that is, we do not. We simply bought the plant and put it into operating shape. So far as we are concerned, it began when we bought it. It is not true that the oldest brick and concrete building that we have was erected in 1912 or 1913; some are older than that. My opinion is that those buildings would have a probable life of thirty-three years; that is the generally accepted life of that class of buildings among appraisers and accountants. The buildings are substantially constructed and have been kept in repair. Quite a number of them were destroyed by fire and partly rebuilt. At Marion we had two or three additions to the foundry that had corrugated-iron siding and those sidings had to be replaced in approximately twenty years. The remainder of the buildings were not replaced; they were of brick and concrete construction. A very small part of the plant was corrugated iron, so small that we did not figure it separately from the rest.

Our patterns conform to the shape of the castings that we make. Patterns themselves are mostly made of aluminum. The life of those patterns depends on how constantly they are used. If they are used every day they do not last more than two or three years, but we do not have many patterns that are worked all the time. It depends on the orders we get. Our output is made on orders and if we do not have an order for the pattern we take it out of the foundry and put it in the pattern vault and keep it until we get another order. The ordinary life of these patterns under existing conditions is, as I think, about five years. They are not necessarily worn out, but a design is very apt to be changed, and of course when the design is changed, the pattern is no good. My estimate of depreciation was based partly upon what I consider the probabilities that the
79 design will be changed and the wear and tear on the property.
I would consider the ordinary physical life of these patterns under normal existing conditions, if they were put in sand and run every day, would be about five years.

When Coats and Burchard made their appraisals, they considered depreciation in the case of all their appraisals. The depreciated values were stated separately. I have not testified as to depreciation values which were found by that company. What I have testified to relates to reproductive values, and I gave my opinion of what the depreciation was on those plants on March 1, 1913. The books furnished by Coats and Burchard show rates of depreciation. The taxpayer's Exhibit #4 shows the reproductive value of the Grand Rapids plant to be $354,314.07. The depreciation schedule of Coats and Burchard is over at the hotel, but it is not in this book. There is no depreciative value found in this book, nor is there any depreciative value for any of the plants found in the exhibits which have been introduced. The exhibit concerning the depreciated value is in that red book; taxpayer's Exhibit #6 is the only exhibit showing depreciated values. That exhibit refers solely to buildings and

equipment at 4060 Princeton Avenue, Chicago. The depreciation was found to be $9,752.67 on a total reproductive value of $37,942.97. I do not know what rate of depreciation that represents. It is about 25% of the total value, but what the actual rate is I can not say. I think that building was built in '93, so that is 25% applies for approximately twenty-two years. The building was of brick construction. I believe that Coats and Burchard were qualified to make their appraisal and were qualified to find depreciation of the same: that their results as to this building were proper. There is no particular distinction between those buildings and our other brick buildings as to depreciation rates. That building shortly after we left it in 1907 was overhauled and new roof and new floors were put on it so that in many respects it was a new building. Our other buildings were also overhauled and repaired to any necessary extent. I do not know what rates Coats and Burchard found proper as to machinery. Nor what rates they used on our corrugated-iron buildings: nor what rates they found proper as to any of our property. I have schedules at the hotel, similar to the one here. It does not show the rate per year. It shows the amount of depreciation that they figured to be accrued on the property, particularly
80 on the three plants in dispute. I do not think the Coats and Burchard Company or anybody else knows how long it has been in existence: that was their estimate of the amount the building had depreciated at the time they took the appraisal. In 1915 or at the beginning of 1916 our company wrote on its books a reproductive value found by Coats and Burchard. We put the depreciation up in a depreciation column on the other side of the ledger. Our depreciation reserve on our books was $280,000.00 and as I recall it, the Coats and Burchard depreciation figure was $262,000.00. We figured that our figure was very close and balance the difference between the Coats and Burchard depreciation and our book depreciation was applicable to the patterns, automobiles, and the little office furniture that was not included in the Coats and Burchard appraisal. Our own depreciation reserve was somewhat greater than that found by Coats and Burchard. That was due to the fact that we had applied depreciation on some items that Coats and Burchard did not include in their depreciation figures. We still maintain our own depreciation reserve, and did not adopt the Coats and Burchard depreciation reserve, because it was practically the same as ours. We did not think it was necessary to make any change to bring it up to the exact figure. It is my opinion that the reproductive values found by Coats and Burchard as of the latter part of 1915 represent the fair market value of the properties on March 1, 1913, less the additions between that date and the date of the appraisal. The reproductive value on March 1, 1913, would be greater than a fair market value by the amount of depreciation that had accrued at that time. In my answers yesterday as to the values, after I had given the reproductive values, I also stated the amount of deprecia-

tion I figured that had accrued on March 1, 1913. The difference would be the fair market value. The basis of my opinion that the Coats and Burchard appraisal less depreciation reflects the fair market value is the reputation that Coats and Burchard Company had for being a conservative appraisal company. I base my opinion upon my knowledge of what the properties were worth in conjunction with the figures prepared by Coats and Burchard. I consider myself qualified to make an appraisal as of March 1, 1913, of the properties of our company from the help I could get from the Coats and Burchard appraisal. The Coats and Burchard appraisal consists of an inventory of the property plus computation as to the
81 reproductive costs of the properties. I am not an appraiser,
but I do claim to have knowledge of our own properties and that the records that we have of the additions to our plants and the appraisal of Coats and Burchard which was taken at the end of 1915, it was very easy to figure back what we must have had March 1, 1913.

My home at present is in Chicago. I have lived at Marion, Indiana, and in Michigan for a while. I was living in Chicago in 1913. I presume I spend half of my time in Chicago and I make monthly visits to the plants at Marion, Grand Rapids, and Franklin. On my visit to these plants it was my practice always to go out through the plant, and I also checked up on the additions to property that were put on the plant books and went out to see that these additions were really there, so I was very familiar with all the properties of the company. I base my idea of the 1913 values on the records of the Bureau of Labor, Department of Commerce. I do not consider myself competent to appraise industrial properties generally in the localities where my company owns property as of 1913. I am not undertaking to appraise the industrial property of other concerns. Even if I had opportunities to inspect those concerns. I am familiar with the values and prices of all the different kinds of property owned by our company. I gained this knowledge largely from the records of the company; the vouchers for all additions to property that were made went through my hands and the appraisals of Coats and Burchard gave me the values of the other items. In 1913 our company owned some property, machines, material and equipment that was either partly or totally obsolete and not being used. Coats and Burchard would show the reproductive value of those items and then depreciate them very largely in their depreciation schedule. It is a fact that if Coats and Burchard should find the reproductive value for a wornout plant that would be just the same as a reproductive value of a new plant of the same size and character.

Redirect examination:

I have now the exact figures before me as to the amount of the cost of the Chicago plant. It is $353,328.57. That is the plant at 46th and Winchester Avenue. Its reproductive value, as shown by the appraisal of Coats and Burchard, is $344,600.77. The cost of

the assembly plant at Franklin was $31,951.50. Coats and
82 Burchard found the reproductive value of this plant at about
$1,000.00 more, I do not know the exact figures.

Recross-examination:

The letter which you show me of the Chicago Railway Equipment Company, dated November 16, 1922, with enclosure, states that, according to the Secretary of Lloyd, Thomas Company, there was a difference of 10% between the values of 1913 and 1915 on machinery. The Lloyd Thomas Company found that the machinery such as was used by our company, cost approximately 10% more at the time of the appraisal than it did on March 1, 1913. I do not doubt but what that was that man's best opinion, but I do not think it is as good a record as the Department of Commerce. We thought it good enough to send to the commissioner at that time to influence his action, but we have learned lots about the business since that time. I do not desire to repudiate that finding.

Mr. Oppenheim. We have no further evidence.

The commissioner offered in evidence, report of E. A. Alden, internal revenue agent in charge, dated June 10, 1922, to the receiving of which letter in evidence the taxpayer objected, which objection was sustained. Thereupon the commissioner rested his case.

Edward B. Leigh, a witness for the petitioner, being first duly sworn, was examined by Mr. William S. Oppenheim.

My name is Edward B. Leigh. I reside at Chicago and am president and general manager of the Chicago Railway Equipment Company. Have been connected with that company from its inception thirty-five years ago. Its principal business is manufacturing railway supplies and equipment. Prior to my connection with that company, I was with the National Hollow Brake Beam Company, of which the Chicago Railway Equipment Company is the successor. Was with the prior company five years. The National Hollow Brake Beam Company was engaged in the business of manufacturing metal brake beams for railroad cars. The National
Hollow Brake Beam Company was the pioneer in the busi-
83 ness of the introduction of metal brake beams. The business
was entirely new.

Before that time, from 1883 to 1887, I managed the American Brake Company at St. Louis, now a part of the Westinghouse Corporation. While connected with the American Brake Company I constructed the first building which they built in 1883.

The Chicago Railway Equipment Company took over the business of the National Hollow Brake Beam Company under what was called a lease; it was really a purchase. The consideration, I think, was $975,000.00 to be paid in fifteen annual installments. The original paid-in capital of the Chicago Railway Equipment Company was thirty thousand dollars. No further sums were ever paid in to its capital.

At the time the Chicago Railway Equipment Company was organized and began business, we did not manufacture any of the parts of the metal brake beams. We assembled. The first property which we purchased which manufactured parts which entered into the brake beam was when we bought the Grand Rapids plant in 1905. It was a malleable iron plant. Our purchase was due to the fact that we had great difficulty in getting our malleable castings. We were a very large consumer and became the second largest consumer of malleable castings in Chicago, and we wished to have full control of the manufacture and also from the standpoint of economy. The Chicago Railway Equipment Company had been making money from 1892 down to the time of this purchase. The original plant was built at Princeton Avenue for the National Hollow Brake Beam Company. I built that plant in 1889 and we built additions thereto, I think, along in 1900. Then we built what is now called our Robey Street plant in Chicago in 1907. We built a plant at Detroit in 1902, but did not built the plant which we own at Jersey City. In the construction of these plants, I had the supervision and the paying out of the moneys. I made the purchase of the Grand Rapids plant, entered into the contract for our company and paid the money for it.

In 1906 we bought the Marion Malleable Iron Works at Marion, Indiana. At the time we purchased this property, the company which owned it was not bankrupt, but they were not doing a very successful business, and we were able to buy the plant at what I thought was a very low price and I recommended it to the board and
they bought it; it gave us additional facilities for castings
84 that we required. The two plants which we acquired at Grand
Rapids and Marion are malleable iron plants and after we acquired them, we put them in operation. The Chicago Railway Equipment Company took about 80% of the product of the Grand Rapids plant and it took about 20% of the Marion plant, the remaining 80% of the Marion plant and the 20% of the Grand Rapids plant being for general trade.

In 1912 we acquired a plant at Franklin, Pennsylvania. That was a bankrupt concern; we bought that plant for the reason that it was manufacturing an exclusive section which we found very desirable to use in our brake beam, called an U-bar, and to control the production of that was one of the principal reasons why we bought the plant. After we took over the Franklin plant, we practically manufactured everything which went into our brake beams, except small parts, like bolts or nuts. After we acquired the Franklin rolling mill, we put it into operation. It was being operated when we bought it, but not in a very successful way. We continued its operation and the next year the greater part of the plant was burned and we rebuilt it.

I know, I think I know, the fair market values of these various properties owned by the petitioning company on the first day of March, 1913. On March 1, 1913, the value of the steel buildings at

Franklin, Pennsylvania, was $78,489.00; power, $41,920.00; machinery and equipment, $251,956.00; or a total of $372,365.00.

The value of the Marion plant was, buildings, $154,481.00; power, $3,225.00; machinery and equipment, $142,404; or a total of $301,110.00. The buildings were brick and concrete and bear a depreciation of 3%.

The Grand Rapids buildings had a value of $139,236.00; power, $16,448.00; machinery and equipment, $170,886.00; a total of $326,550.00.

The value of the buildings of the Chicago plant are $217,364.00; power, $15,916.00; machinery and equipment, $147,833.00; a total of $381,115.00. That includes the Princeton Avenue plant.

The Detroit plant are: Buildings, $49,937.00; power, $9,857.00; equipment, $96,391.00; total, $156,185.00.

I know the earnings of these several plants from the year 1913 down to 1920. I have memorandum showing these figures. I confess that it is impossible for me to carry all these figures in my mind. The reports of Price, Waterhouse and Company show
85 these earnings. There are eight reports. In 1913, Marion earned $90,232.00; Grand Rapids, $92,646.00; Franklin, $18,662.00. The Franklin plant was not in operation all the year. The fire occurred in April or May, 1913. It was not completely rebuilt until late in 1914. In 1914 the earnings of the Marion plant were $19,618.00; Grand Rapids, $44,673.00; and at Franklin there was a loss of $30,341.00. In 1914 was a most depressed year, not only in our business, but in all business.

In 1915 the earnings of Marion were $30,495.00, and Franklin $49,572.00, and Grand Rapids $35,538.00.

In 1916 Marion earned $90,712.00, Grand Rapids $62,807.00, and Franklin $43[illegible]368.00.

In 1912 Marion earned $23,765.00, Grand Rapids $47,375.00, and Franklin $23,371.00. We owned the Franklin plant only a part of that year.

In 1911 Marion earned $9,451.00 and Grand Rapids had a loss of $10,244.00.

In 1910 Marion made a loss of $6,172.00 and Grand Rapids $5,597.00. During those years the condition of the trade in our line of business was very depressed.

In 1917 the earnings of Grand Rapids were $94,898.00; Marion, $263,698.00; and Franklin, $237,024.00. In 1918, Franklin earned $135,682.00; Grand Rapids, $126,086.00; and Marion, $132,918.00.

In 1919 Marion earned $189,854.00; Grand Rapids, $140,171.00; and Franklin, $128,661.00. In 1920 Marion earned $383,193.00; Grand Rapids, $182,329.00; and Franklin, $96,303.00.

The earnings testified to by me truly represent the actual earnings of these several plants, except at Grand Rapids and a portion of the time at Marion. That is due to that part of the work which they did for the company. We did not allow them the market price of the product that they made for us. We allowed them an arbitrary price. That is reflected in the earnings of the two plants, although the total was almost the same. Had these malleable parts which they manufactured for the Chicago branch, been sold to the general trade, the price would have been higher than we allowed them for the company work. Of course, the profits were reflected in the company's earnings, but in figuring up the amount which the Grand Rapids plant earned we did not give it credit for all that it made for the company, because we gave them an arbitrary price and not the market price for their malleable castings.

86 Out of the $30,000.00 which was originally invested in 1893, the company has made, under my supervision, about $15,000,000.00 up to the present time. We have paid dividends of about $6,500,000.00 and have paid to the Government in Federal taxes something over $900,000.00.

I remember the sale of the Detroit plant. The purchase price was $150,000.00. We were to do certain work on the plant which cost us in the ne*ig*hborhood of $4,000.00. It was a sales contract; they paid $50,000.00 down and were to pay the balance of $100,000.00 in three years. I do not recall the year in which we returned a profit to the Government for this plant. We did not make the return for the year 1920 of any profits on this sale for the reason that we had not made any. The parties agreed to pay $100,000.00 when they got the deed. They were in doubtful financial condition and finally went into bankruptcy. The sale price was $150,000.00, of which $50,000.00 was paid down in 1920. I thought we would have to take the property back, but owing to then rapid rise of real estate in Detroit, they were able to sell the property. This was done by the trustee in bankruptcy. I think it was in 1923 that we reported to the Government the profit which we made on this sale.

Cross-examination by Mr. MITCHELL:

We sold the Detroit plant in 1920. We did not sell the machinery; simply the real estate, the buildings. They did not give us notes for the $100,000.00; simply a sales contract. They were to pay us $100,000.00 at the expiration of three years. The property was bought by a man by the name of Hull, who attempted to do an automobile business, as I understood, in this plant. I do not know whether he had been in automobile business before or not. He went into bankruptcy long before the maturity of the contract. He did not pay interest; at least I don't recall whether he paid the interest or not. Mr. Forward will know the details.

We owned other plants besides those in Marion, Grand Rapids, and Franklin. We owned the Detroit plant up to the time we sold it and also owned a plant in Chicago. We ran along with these five plants and each year we separated the earnings of the three plants, Grand Rapids, Marion, and Franklin. There was only one main plant in Chicago. The Detroit plant when it was operating was carried in the Chicago books. It was doing the class of

87 work which we were doing in Chicago. Our books showed separate earnings for Marion, Grand Rapids, and Franklin. The balance of our earnings would be attributed to the Chicago plant and the Detroit plant when it was in operation. Whatever was done in Detroit was entered under the Chicago heading. Grand Rapids, Marion, and Franklin are doing a general business more or less outside of our own. The Detroit plant was exclusively doing our own work; that is, manufacturing brake beams. Our principal completed article is brake beams. Chicago is the assembling plant. Marion, Grand Rapids, and Franklin generally furnish these articles in a partially completed form to the Chicago plant. Each of the castings are completed and bars and sections from Franklin are completed in themselves and they are assembled in Chicago into structures which we call brake beams. The completed castings are turned out at Marion, Grand Rapids, and Franklin and sent to the Chicago plant and they are there assembled into a final unit of the brake beam and then sold to the trade. The income of the company very largely comes from sales made by the Chicago plant. We allow these other plants a certain amount for castings. I fix that and it is arbitrary. It is just an interdepartmental segregation of the total earnings. The allowance which is made these plants for the articles which they make for the company is on an arbitrary basis. This is not so much so in Franklin, however, because that is more governed by the price of steel. All of these plants constitute one industrial unit. They all lead to the completion and supply to the trade of a completed brake beam, except in the ordinary affairs of these plants in doing general outside work. To some extent, Marion, Grand Rapids, and Franklin plants complete and sell articles direct to the trade entirely outside of what they furnish to the Chicago plant. Those plants are complete industrial establishments if they were operated separately. They are complete and it is simply because they have one manager, that is one head of a department, that they are an industrial unit. We can figure the separate earnings of the three plants. I can give you the earnings of those years, the complete earnings, but the Chicago plant earnings are made up of a number of different items. We make other things than brake beams. We do repairing and rebuilding and to get the earnings of the Chicago plant it would require some little consolidation.

The Franklin plant, which we acquired in 1912, was in the
88 hands of a receiver and we bought the claims and controlled it in that way. We purchased the outstanding claims. I do not recall just whether we owned all the stock of that company; it is so long ago, but we received dividends on a portion of the stock. I do not recall about that even. My recollection is we bought the stock along about 1910 or 1911, and we were in practical control of it for that time. We were not in control all that time, but a portion of it. It was operated, however, independently. It was operated as a separate corporation, but I think it is a fair statement that through its stock ownership the Chicago Railway Equipment Com-

pany practically controlled it. I had an appraisal made of the affairs of the Franklin Steel Company in October, 1909. The fact that an appraisal was made in 1909 does not necessarily indicate that our company controlled the plant at that time. Our books will show when we acquired this interest and Mr. Forward can probably locate that quicker than I.

I have an opinion of the fair market value of all these plants on March 1, 1913. It is based on my knowledge of the plants, their operating values, their productive values, as shown and confirmed by the appraisal of Coats and Burchard. The figures which I have read into the record are identical with the figures obtained by Coats and Burchard, deducting for the additions made between March 1, 1913, and December, 1915. Coats and Burchard appraisal was made in 1915. I have arrived at the subsequent figures which represent these values by taking the appraisal made in December, 1915, and subtracting from that the additions made between March 1, 1913, and D'cember, 1915. The Government reports show that the values were almost identical at both periods. I believe such to be the fact, and I can confirm this form several different sources. The reproductive values of these plants, machinery, buildings, and all, was about of the same value in 1913 as it was in 1915. I do not think there was much difference between the fair market value and the reproductive value, except as it may have been increased in the meantime. The trade was very much depressed in 1910 and 1911. In 1912 it picked up. There was quite a considerable improvement; 1913 was a very good year. In 1907 the country as a whole had a very big depression, or rather it came about really in 1908. This depression hit the railroads with unusual severity and also companies supplying railroad equipment. We recovered from that depression in
1908. There was a fair business in 1909, 1910, a portion of
89 1911, and a spasmodic recovery in 1912. There had been a
pronounced slump in some of the years from 1908 to 1912 or
13. There was a decided recovery in 1912 and 1913 in demand for railroad equipment. The lack of buying for three or four years is apt to be made up to a considerable extent in the purchases made in the succeeding years. The year 1914 was another year of depression and our business suffered. When we entered the World War our business increased. The increase was much more noticeable in the steel work and in the foundries than it was in the brake beam department. Our largest earnings before 1918, 1919, and 1920 were in 1917. We did not make more money in 1918 and 1920 than we did in 1917. Some particular plant might show more earnings in one of those years than it did in 1917, but not with the company as a whole.

The value of our plants in 1917 was the same as it was in 1913, save for what additions had been made to the plants subsequent to 1913. I think the plants were more valuable in 1918, 1919, and 1920, but as to the market value or reproductive value, of course, it would not be increased so much. From the standpoint of market value a manufacturing plant is of course very much more valuable

if it is being successfully operated, but there might be conditions such as existed in 1918, 1919, and 1920 that we could have gotten a great deal more than the reproductive value of the plant. I will agree that in 1918, 1919, and 1920 the market value of these plants in general as a whole was greater than it was in 1913. In regard to the enhancement of values, it would depend altogether from what standpoint you speak of value. I think the market value of the corporation was greater in 1918, 1919, and 1920 than it was in 1913. From the standpoint of market value, a manufacturing plant can hardly put its value above its reproductive cost. Now what would make a plant more valuable, for instance, a successful operating institution over the reproductive cost of that plant, would be the fact that they could not afford to take the delay that might be necessary to get a new plant or to interrupt their business, but you could not very well get more than the reproductive value of the plant under normal circumstances. If somebody wants a plant and wants it quick, wants to operate at once, to get into business, that would be a matter of negotiation. You could get much more for it under those conditions than under ordinary conditions. During
those later years, there would be a substantial increase in the
90 reproductive value of our plants, but that, of course, would
be determined by the price of materials. Material and labor
increased considerably over 1913.

The stock of our company has been listed in the St. Louis Stock Exchange., I could not tell you when it was listed and I never paid much attention to it. I should say that there is very little buying or trading in our stock on the St. Louis Stock Exchange. Our stock is very much distributed; we have something over nine hundred stockholders and over five hundred are women. I have no information available here as to the number of shares sold in different years. My recollection as to what happened in 1913 about the sale of stock would not be accurate. I could not, without looking at memorandum, give an approximate idea of the values of our plants except in a general way. I could not give you the total of all of the business of the Chicago Railway Equipment Company on March 1, 1913. That would be a good deal of a guess. I do not know why you want me to make a guess unless you want to test my memory. I make up my opinion by constant acquaintance with the situation, but when it comes, when I want to know the detail, I get that from the books of the company. Now, if it comes to matter of insurance, of insuring according to the reproductive value of the plant, I would not do that from a matter of memory. I would have the same difficulty in naming an approximate figure of the individual plants except in so far as my memory has been refreshed by these memorandums. Without these memorandums I would have great difficulty in naming either the total value or the value of any separate item. When Coats and Burchard made their appraisal, I looked over those figures. I was led to believe that these figures reflected the market values from the prices which they

had on them, and in the next place I know that is the method of appraisal. When an appraisal is based—steel would be put on a ton basis, brick would be on the basis of a thousand, lumber would be upon the basis of board measurements—and those large controlling fundamentals would indicate the basis of the appraisal; and I have satisfied myself that the items shown and the accounts were fairly arrived at from a reproductive standpoint. In finding the market value of the Chicago Railway Equipment Company, its trade value, in ascertaining the market value if we were going to sell our plant, I certainly would take into consideration the worth of it to us as an operating plant. We would base that largely on the earnings
91 and the prospects for the future. That would be the primary basis, its reproductive value. I believe that market value primarily rests on reproductive value costs.

Redirect examination by WILLIAM S. OPPENHEIM:

I think I have emphasized that when I speak of market value as being based mostly upon reproductive value, I have reference to the earning conditions of the plant. My idea is that the basis of the value of the plant is the reproductive value. Now then the advantage to which that plant is being operated makes another value. A manufacturing plant would be much more valuable to a man who wanted to conduct a certain business if it was operating successfully and profitably. The Marion plant in the hands of the persons who then owned it was a losing concern, but in the hands of the Chicago Railway Equipment Company it became a profitable concern. There would be a difference in the market value of those plants in the hands of the Chicago Railway Equipment Company and in the hands of the persons who owned the plant before. That is why I have said that in my opinion the plant was worth $300,000.00. I do not believe that we made the purchase of the Franklin plant through a receiver by an order of court. The plant was in the hands of a receiver and had been for quite a number of years. I do not recall the legal phases of this transaction. Mr. Hughes was the manager and the receiver from the time I first knew of it and he continued for a number of years after we bought the plant. There was no question but that we were buying the plant at the bargain price.

The MEMBER. As I understand the mandate of the higher court, we are to arrive at the fair market value, if we can, of these depreciable properties. Possibly the evidence that was taken in the preceding hearing gives this information, but what was the value of these properties placed on the books of the Chicago Railway Equipment Company, that is the March 1, 1913, value, was that value in 1913 approximately the figures that you are contending was the fair market value?

Mr. LEIGH. Mr. Forward can answer that question better than I can, Judge.

The MEMBER. You do not know whether the fair market value that you are contending for—are these in any wise reflected in the taxpayer's books of account?

92 A. I do not know at this moment.

The Member. How was the fair market value of the Chicago plant, that is the fair market value on March 1, 1913?

A. Well there was very little difference between the cost of the Chicago plant and the market value and the reproductive value. This controversy as I understand it has arisen more because in the cases of the Franklin, Marion, and Grand Rapids plants, they were all bankrupt plants and bought at a very nominal figure, but in the hands of any successfully operating company, they were worth a great deal more than we paid for them. That was not true of the Chicago plant; we built that, and the price—that is the costs of construction—were substantially more in 1913 than they were in 1908.

W. A. Forward, a witness for the petitioner, being first duly sworn, was examined by Mr. Henry W. Price:

My name is W. A. Forward and I am the auditor of the Chicago Railway Equipment Company. I have already testified at the former hearing in this case.

In the year 1919, the Chicago Railway Equipment Company paid dividends of $239,335.98.

Mr. Price. At the former hearing you testified in lump sums as to various matters which made up the properties of the company apart from ground values. I wish you would refer to the books of appraisal in evidence and point out the pages where you find items relating to power and items relating to machinery and equipment in regard to each of these plants, from which you gave the totals which you have testified before. I will ask you to refer to these books by exhibit numbers.

The Witness. I refer to taxpayer's Exhibit #2, which is the appraisal of the Chicago plant, page 247, general summary, building material shows $182,762.09, which is the amount of the buildings reported. Pages 111, 112, and 113 show power, amounting to $15,968.70. I find power and equipment and machinery and equipment scattered all through the book. I simply took the buildings and power and the difference would be the machinery and equipment. These were the only three classifications made of the property. The book is not divided into these classifications. It separates building materials and then it has a whole lot of other classifications 93 which are divided into power and machinery and equipment as those were the three classifications that were used in arriving at the depreciation. The amount of the buildings is shown on pages 128, 63 to 67, 86, 87, 120 to 135, 209, 210, 213, 216 to 218, and 210. The sum totals of these pages for buildings is $182,762.09; power $15,916.17. The date of this appraisal was December 31, 1915. The footing of the power is found on page 113. There is a footing labeled machinery. All the balance of the appraised value of the Chicago plant I have attributed to machinery and equipment. The appraisal of the Princeton Avenue Building was not put in the last time. The building and equipment is all, there is no power there.

There was another book that contained the same figures and that was put in the last time.

Exhibit #4. Grand Rapids plant. Buildings, pages 1 to 4, 24 to 47, 81, 85, 115 to 120, 149 to 152, 169 to 170, 181, 182, 189 to 193, 230 to 232, 242 to 247, 259, 260, 261, 279, 283, 284, 287, 288; total, $143,568.37. Pages 16, 17, 18, total $10,974.33; and page 62, machine G–12, 1 water tube boiler, $5,474; making a total of $164,448.33.

The item of $5,474.00 constitutes power, and the balance of the items is machinery and equipment.

Exhibit No. 5, the Marion plant: Pages 1 to 5, 40, 41, 52 to 55, 72, 73, 83 to 86, 87, 124, 125, 126, 147 to 150, 151, 152, 183 to 186, 209, 210, 222 to 227, 258, 259, 274 to 281, 301, 302, 315 to 317, 328, 329, 353, 354, 376 to 379, 403, 409, 412, 423, 426, 427, 443, 445, 454, 455, 459, 460, 464, 468, 469, 474; total of $157,466.75.

The last item represents buildings. The Marion plant is peculiar in regard to its power situation as distinguished from other plants, because it don't produce any of its own power. It buys all of its power, but there are certain machines that are in the nature of power producers and would be in other plants. So to be on the safe side I put these in as power, although they are not in the sense of producing power. Those items are found on page 105, item M–69, amount $1,782.02; item M–72, $590.09; items M–70 and 71, $93.15 and $53.20, respectively; page 290, machine No. M–132, boiler, $4,568.21; page 369, water softening system, $2,224.09; page 387, 1 vertical boiler, $830.00; page 407, machine M–166 and 167, $766.50; page 431, machine M–172 & 173, $766.40; a total of $11,673.86.

94 The balance of the items mentioned on that book of appraisals relating to the Marion plant are matters of machinery and equipment.

The items on the following pages relate to buildings, viz. 1 to 4, 18, 191, 27 to 34, 36, 37, 71, 72, 77 to 81, 96, 97, 98, 119 to 126, 147 to 151, 170, 179, 180 to 188, 224 to 227, 245, 246, 247, 266 to 273, 297, 303 to 308, 309 to 311; total of $163,742.02.

The items relating to power at the Franklin plant are found on page 14, a total of $17,504.99; on pages 113, 114, a total of $26,322.18, and on page 201 of $7,930.15, making an aggregate of $51,757.32.

Pages 1 to 11, 99 to 101, 131 to 137, 180, and 181 in the appraisal of the Detroit plant relate to buildings and the amount is $49,937.24 and the items relating to power are found on pages 47, 48 and the first item on page 49, aggregating $9957.14, and the balance is machinery and equipment. The same is true in regard to all the appraisals that I have testified to. That is when I have given items that belong to buildings and those that belong to power, everything else is machinery and equipment. I have covered all of the plants except the Princeton Avenue property.

The book which has been handed me was received from Coats and Burchards Appraisal Company and it purports to be an appraisal of the building and equipment located at 4060 Princeton Avenue, Chicago, Illinois. I was familiar with this property and its contents on March 1, 1913, and knew its value. This appraisal book was received early in 1916 and I examined it at that time.

(The book is offered and received in evidence and marked "Petitioner's Exhibit No. 1, March 22.")

In my testimony heretofore given as to the value of the power, equipment, buildings, etc., in the properties belonging to the company, I have included in my totals the amounts shown in this book. The items on pages 1 to 4, amounting to $34,602.31, are buildings. The balance is equipment. There was no power in that building.

The main manufacturing plant of the Chicago Railway Equipment Company, in manufacturing brake beams, was at Chicago. We had a branch plant at Detroit until that plant was sold, and it has a branch plant at Franklin, Pennsylvania, apart from its rolling mill there. It was manufacturing brake beams in all of these three plants. The brake beam business is all handled from Chicago.
95 All the selling and buying is done there. All the billing and collecting of accounts. The Marion Iron Works, the Grand Rapids Malleable Iron Works, and the Franklin Steel Works all operate as independent companies; that is they have their own managers and superintendents and officers and office forces and do their own buying and selling and billing and collecting. They keep their own sets of books. We simply transfer the result of their operations from their books to our books at the end of the year. The brake beam business is all handled in the Chicago office, regardless of where the beams are made. We segregate from our earnings of the Marion, Grand Rapids, and Franklin plants the earnings of the business other than brake beam business. The balance of our earnings in any given year as shown by our books will be the earnings of the entire brake beam business, wherever those brake beams are manufactured.

At Franklin we had two plants; one is the Franklin Rolling Mills and the other is the Franklin Brake Beam Shop. They are entirely separate. The rolling mill goes under the name of the Franklin Steel Company and the other goes under the name of the Chicago Railway Equipment Company. The brake beam shop is operated by a superintendent who is independent of the Franklin Steel Works organization, and the buying and selling for this plant is done in Chicago and we do the billing and collecting at Chicago, whereas the Franklin Rolling Mills does its own business itself under our supervision. Mr. Leigh in giving the earnings this morning of the Franklin plant only gave the rolling mill end of it. The reason we separate the earnings is because the organization of the Franklin Steel Works has nothing to do with the manufacture of brake beams. That is handled from Chicago and we keep the accounts and records at Chicago of the brake beam business itself. In giving the earnings of these three plants by Mr. Leigh this morning, none of the brake beam earnings were included. The brake beam business is given separately.

The total earnings for the company during the following years were:

1910	$294,249.02	1916	$628,626.68
1911	108,165.60	1917	812,111.75
1912	312,751.42	1918	622,793.12
1913	404,417.11	1919	843,983.11
1914	88,335.38	1920	991,752.84
1915	216,058.12		

96 The capital gain referred to by Mr. Leigh this morning was reported in the income tax return of the Chicago Railway Equipment Company for the year 1923. The Franklin plant was purchased from a receiver.

It is stipulated by the parties that the Chicago Railway Equipment Company filed its income tax return for the year 1917 on or about the 28th day of March, 1918; its return for the year 1918 on or about the 16th day of June, 1919, and its 1919 return on or about the 15th day of May, 1920.

It is stipulated by the parties that the letter dated December 7, 1925, from A. W. Gregg, Solicitor of Internal Revenue, to the Chicago Railway Equipment Company was received in evidence as petitioner's Exhibit #2, which letter is in words and figures following:

"It appears from the records of this office that you have filed an appeal with the United States Board of Tax Appeals, protesting the assessment of additional taxes for the years 1917, 1918, and 1919, and as it is impossible at this time to determine whether the case will be disposed of by the board prior to the expiration of the period of your waiver, you are requested to execute in duplicate and to return to this office at once the enclosed waiver forms.

"If the waiver forms are not executed and returned to this office immediately, the commissioner may find it necessary to make assessment of the proposed deficiency under the provisions of section 274 (d) of the revenue act of 1924. If such action be necessary the collection of the amount of the assessment, or so much thereof as may be in controversy, might thereafter be stayed, pending final determination of your appeal by the board, upon the filing of a claim for abatement, accompanied by a bond, pursuant to the provisions of section 279 (a) of the revenue act of 1924."

WITNESS (continuing). There were waiver forms included in that letter, introduced as Exhibit #2. These forms were executed by the petitioner.

(Counsel for respondent produced from the files of the commissioner the waivers, which were in duplicate, and one of the same was received in evidence as taxpayer's Exhibit #3. Said waiver is in words and figures following:)

CHICAGO, *December 10, 1925.*

In pursuance of the provisions of existing internal revenue
97 laws, Chicago Railway Equipment Co., a taxpayer of 1928
West 46th Street, Chicago, Illinois, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits or war-profits taxes due under any return made by or on behalf of said tax-

payer for the year (or years) 1917, 1918, and 1919 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said board.

(Signed) CHICAGO RAILWAY EQUIPMENT CO.
E. T. WALKER, *Secretary*.

WITNESS (continuing). I have charge of the Federal tax matters of the petitioner and have had charge of such matters ever since there have been Federal taxes. No other waiver has been filed by the Chicago Railway Equipment Company relating to the taxes for 1917, 1918, and 1919 since December 10, 1925. Since December 10, 1925, no notice of deficiency in taxes for the years 1917, 1918, and 1919, or any of such years, has been received from the Commissioner of Internal Revenue by the Chicago Railway Equipment Company.

Cross-examination by Mr. MITCHELL:

My classification of power contained in Exhibit #2 is shown on pages 47 and 48, one item on page 99, and on pages 111, 112, and 113. Pages 111, 112, and 113 are not classified under the name of power. All of the items there are classified merely as machinery. The exhibit, as well as all the other appraisal books, has a summary in the back pages. All the appraisal books have a summary of the values arrived at. There is no classification into power. There is no classification anywhere in the appraisal books of power as a separate item. In several of the books, the buildings are designated as power houses and it would be assumed that the machinery 98 of a power house would be power machinery. In other words, each of these books has a map of the plant it covers, and the copy shows one room or one building labeled power house or power room. I have added items to power which were not included in the power houses at some of the plants. This is done in the Marion plant, in the Franklin plant and in the Grand Rapids plant. All of the items are classified on pages 111, 112, and 113 of Exhibit #2 and those items consist of boilers, engines, and pumps. I have not included any belting, shafting or anything of that sort in power. According to my classification, such items would be equipment. The item of electric power circuit on page 248 of Exhibit 2, from my point of view, is not power nor would I call safety devices around a power plant power or class them as power.

Mr. E. T. Walker has been secretary and treasurer of the company since its beginning. The letter which you hand me, addressed to the commissioner and dated November 16, 1922, is signed by Mr. Walker.

The allocation of power, attached to the letter as Exhibit D–1, purports to be founded on Coats and Burchard's appraisal. It is called the fair, sound value on March 1, 1913, of power and electric equipment as $235,510.80, but that classification is made in regard to the amount of depreciation, not strictly as power. Electric equipment would not be called power, although it is under the same percentage of depreciation.

Mr. Walker signed this letter, but I wrote it and I made the classification. Under the classification made at that time, to which a 7½% rate was made applicable, I described the items as power, electric equipment, and piping, and as having a total value of $235,510.80. Those items could not be considered power because it is all electric machinery and piping. The depreciation rate which has been applied to power is 5% and 10% to machinery and equipment. In my allocation in the letter of November 16, 1911, I allocated to machinery, rolling mills, 5%; to equipment, 10%; to power, electric equipment, and piping, 7½%. When that classification was made up we attempted to make a more detailed classification of the different items in the plant, and when the department wanted to have simply three classifications we accepted it. I classified electric equipment electric equipment and power as taking the same depreciation, and also piping. The allocation of the commissioner is not substantially correct, because he specifies that item as power and gives it a 5%
99 depreciation. My conception of power is boilers, engines,
pumps, etc.; that is, machines generating power. It does not include any of the apparatus or equipment for the transmission of power. The substance of the controversy is whether the apparatus and incidentals connecting with the generating machines shall be also included in power or whether they shall be thrown into machinery and equipment. The commissioner contends, in effect, that the transmission and incidentals connected with generating machines should be classified under power, and I contend they should be classified as equipment.

I furnished Mr. Leigh with the memoranda from which he gave testimony this morning, and I have just finished testifying as to the total net earnings of the plants for these various years. If you should take the earnings for the Franklin, Grand Rapids, and Marion plants and the totals of these three plants and subtract that from the grand totals, the difference would not be applicable to the Chicago plant, because the figures Mr. Leigh gave this morning were what might be called gross earnings; that is before depreciation, while the figures I gave you are net figures. In the operation of the company, we have general overhead expenses such as officers' salaries and matters of that kind. Any expense that is directly attributable to any plant, we charge them for it, but each of these plants in question has a manager of its own so we do not charge them any of the general manager's salary or the general office expense in Chicago. All of the general expenses in Chicago go

to the brake beam business. We make a segregation of the earnings of these three plants, because they are the only ones that do any outside work and we want to know whether the outside work is profitable or not. As I said before, they do their own selling and collecting and we would have to keep a closer check on them. The big outlet of these three plants, the Marion, Grand Rapids, and Franklin plants, does not go to the Chicago plant. They sell more goods on the outside as a whole than does the Chicago plant. Their biggest customer, however, is the Chicago plant. Marion and Grand Rapids furnish malleable castings and Franklin the sections and bars. The Chicago plant is not the second biggest consumer of malleable castings in the country. I did not understand Mr. Leigh to say that. What I understood him to say was that we, at the time we bought these malleable plants, were the largest customer of the National Malleable Castings Company. I think it
100 feasible to attempt an accurate segregation of the earnings
of these separate departments of business. I would say they should be considered as independent industrial establishments. They are complete in themselves. It is true they are simply departments of the Chicago Railway Equipment Company, but each of those three plants is a unit in itself. If tomorrow there was a separation, either one of them was separated from the Chicago Railway Equipment Company, it could carry on just as though the Chicago Railway Equipment Company did not exist. I would not say that their future prosperity or depression depended on what further connection they had with the Chicago Railway Equipment Company because the Franklin plant ships only a small part of its output to the Equipment Company. I would say that each of these plants ought to bear a certain part of the depreciation allowance and a part of the general expense should be charged to these companies. My own service applies to all the several plants. I was at the Marion plant when they bought it in 1906 and was with that plant before that. I started in 1900 as a sort of a cost clerk and general utility man around the plant. I became auditor of the company in 1906–07 when they bought the Grand Rapids plant. I was appointed auditor of the two malleable plants and in 1908 I was transferred to the Chicago office with the title of general auditor. I have familiarized myself with construction costs and the general costs of business as they affect this company.

There was a general depression in the railway equipment business in the latter part of 1907 and 1908. The railroads were not buying equipment like they had been. 1910 was a pretty good year. In 1912 and 1913 there was a period of three or four years in which the railroads bought less than normal quantities. The earnings of the company in 1912 and 1913 were not abnormal by any means. The business was better in those years, but I do not like the expression that there was a taking up or accumulation of railway equipment. My view of that is this: The railway equipment business runs in cycles more or less, depending on the volume of general business

in the country. If business is good, there is lots of freight to handle, then more railway equipment is used, more brake beams are used, and more cars are built. When we have a depression, there is not so much equipment used, and when business starts up again they start buying equipment again, but that does not mean that there is an accumulation over a period of years. It means simply there
101 is more business going on and more equipment required. I
do not think the railroads would get into financial difficulties if there was good business. I would say that the buying of railroad follows closely the curve of general prosperity. Mr. Leigh has written a number of papers and has quite an argument that the railway purchases measure the general prosperity; that if railroads are buying in large quantities, then general business all over the country is good. I think the two would run together very closely. I would say that the railroads did not buy in normal quantities during the period of 1908 up to 1912. 1912 and 1913 were about on a par with 1910. I could not answer as to whether 1913 was the best year in the history of the company without referring to the ledgers. The oldest ledger I have here runs from 1907 and 1913 was the best year since 1907. I mean that the net earnings were the largest for that year. I do not mean that 1907 was better than 1913.

I do not have records with me showing approximately the volume of sales of stock in 1913. There never was much volume of Chicago Railway Equipment stock. While it is listed on the exchanges, it does not amount to a great deal. It is listed on the St. Louis Exchange and it is quoted monthly.

The paper which you show me was made up by Mr. Walker. It shows the range of Chicago Railway Equipment Company stock on the St. Louis Exchange from 1904 to 1920. It shows the prices each month on that exchange.

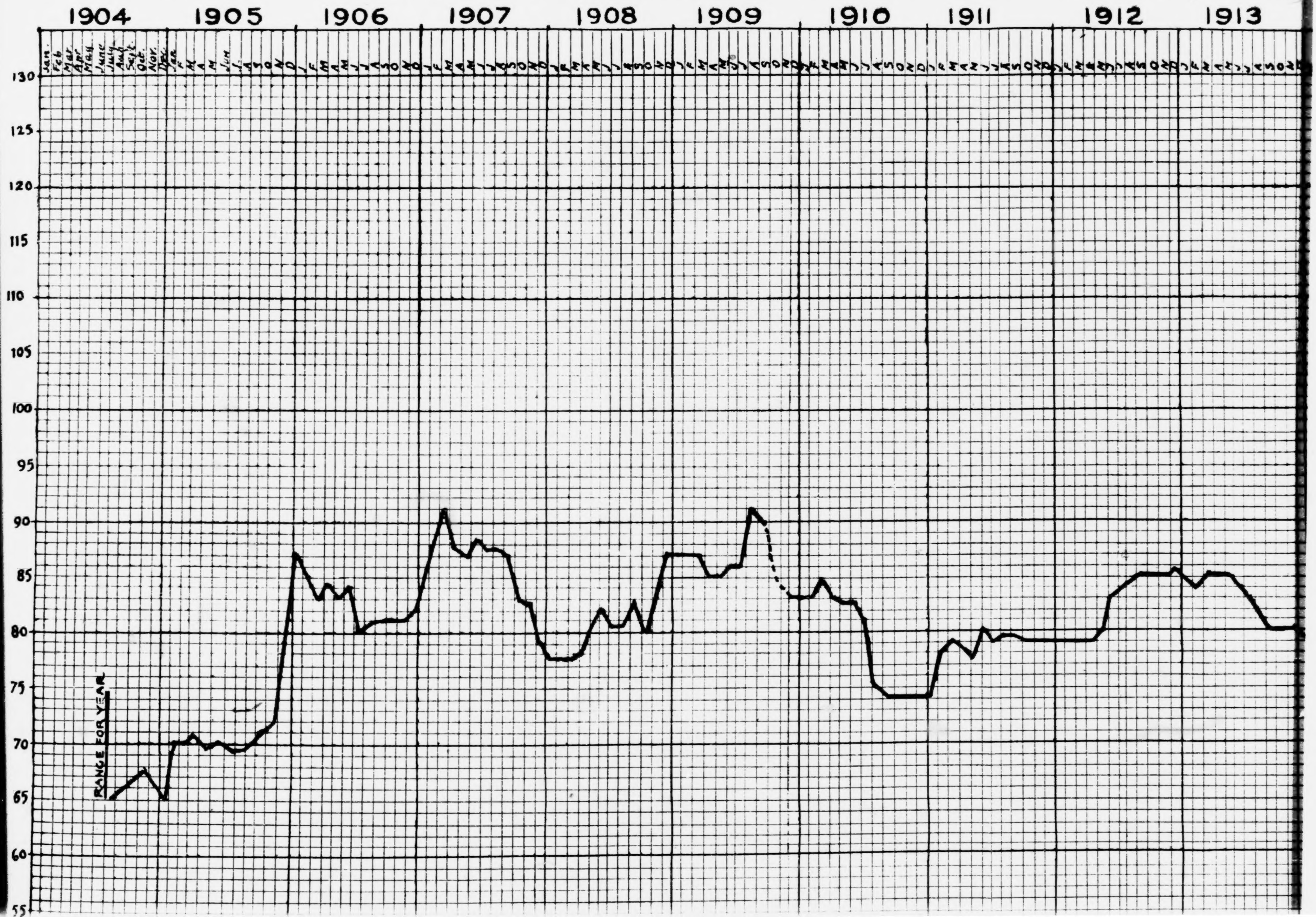
The document was received in evidence and marked "Respondent's Exhibit A," and is as follows:

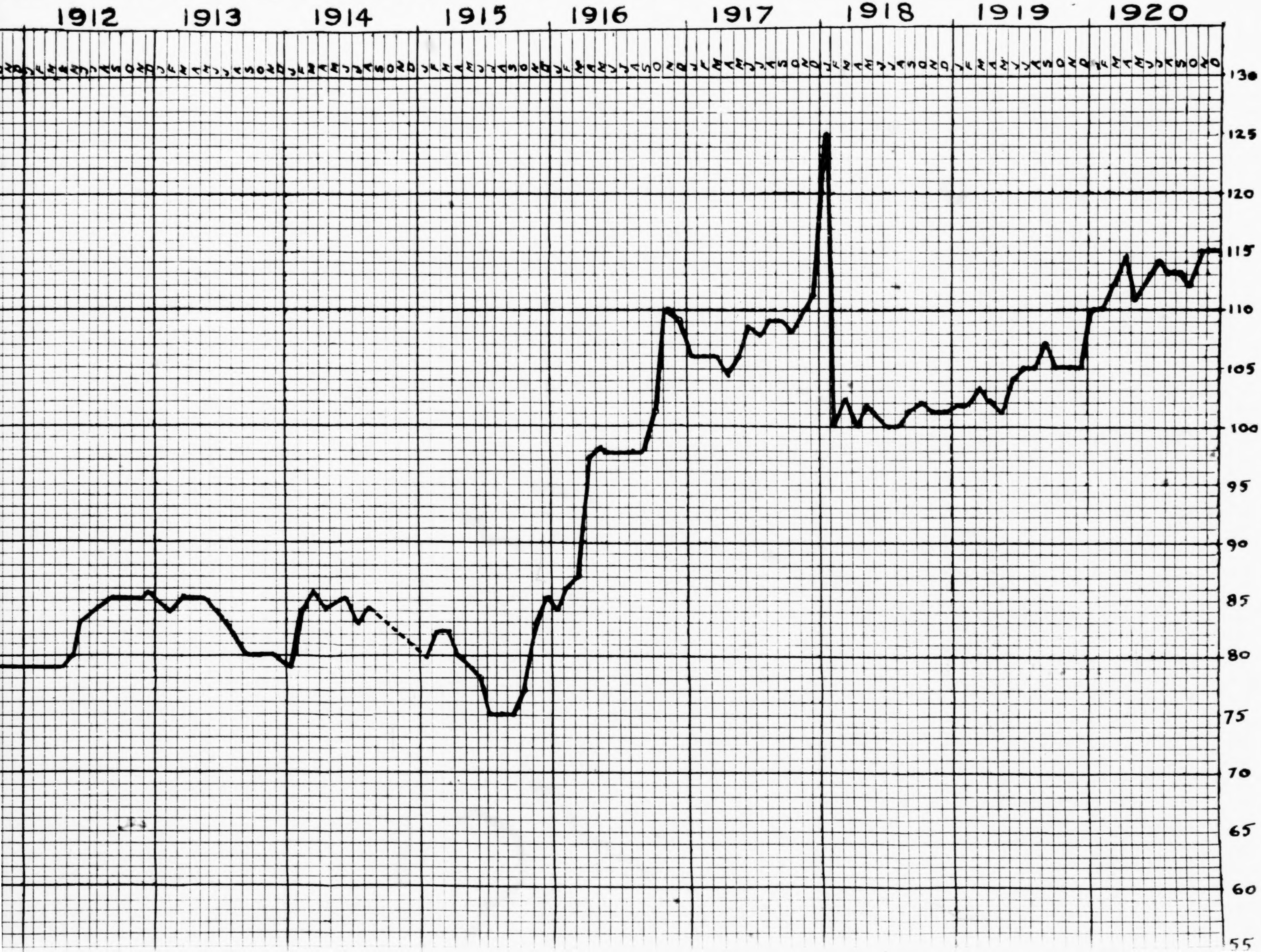
105 There was no particular difference in construction costs
which would be applicable to the plants of our company between 1913 and 1915. Statistics of the Bureau of Labor show that they were practically the same. I am referring to a book called "Wholesale Prices, 1890 to 1921," issued by the Bureau of Labor Statistics. Chart 6 shows metal and metal products, and it shows a percentage of 100 in 1913 and 1915 is the same. In 1916 it shows 155. I understand the 1915 line to be the end of 1915 because the year 1915 extends from 1914 over to 1915 which shows a gradual increase from the low point in 1914 up to 1915. The 1908 level is about 20 or 25% less I would say. I do not know as to that percentage. I would say that that point there is about 1/5 of this point.

Chart #7 refers to building materials. That shows the percentage of 1913 as 100, and 1915 about 95%. 1907 is 100 and 1908 is down again. About ¼ of the space between 100 and 75. 1909 is about 1/5 of that space. That book is a confirmation of my opinion that there

Exhibit "A"

RANGE OF PRICES CHICAGO RAILWAY EQ





RAILWAY EQUIPMENT CO STOCK

was no particular difference between 1912 and 1915. There was some difference between 1907, 1908, 1909, and 1913. It was somewhat lower in 1908 than it was in 1913.

Chart 6 and Chart 7 of said publication were received in evidence and marked "Respondent's Exhibit B," and are in words and figures as follows:

Respondent's Exhibit B

107–108

Exhibit B

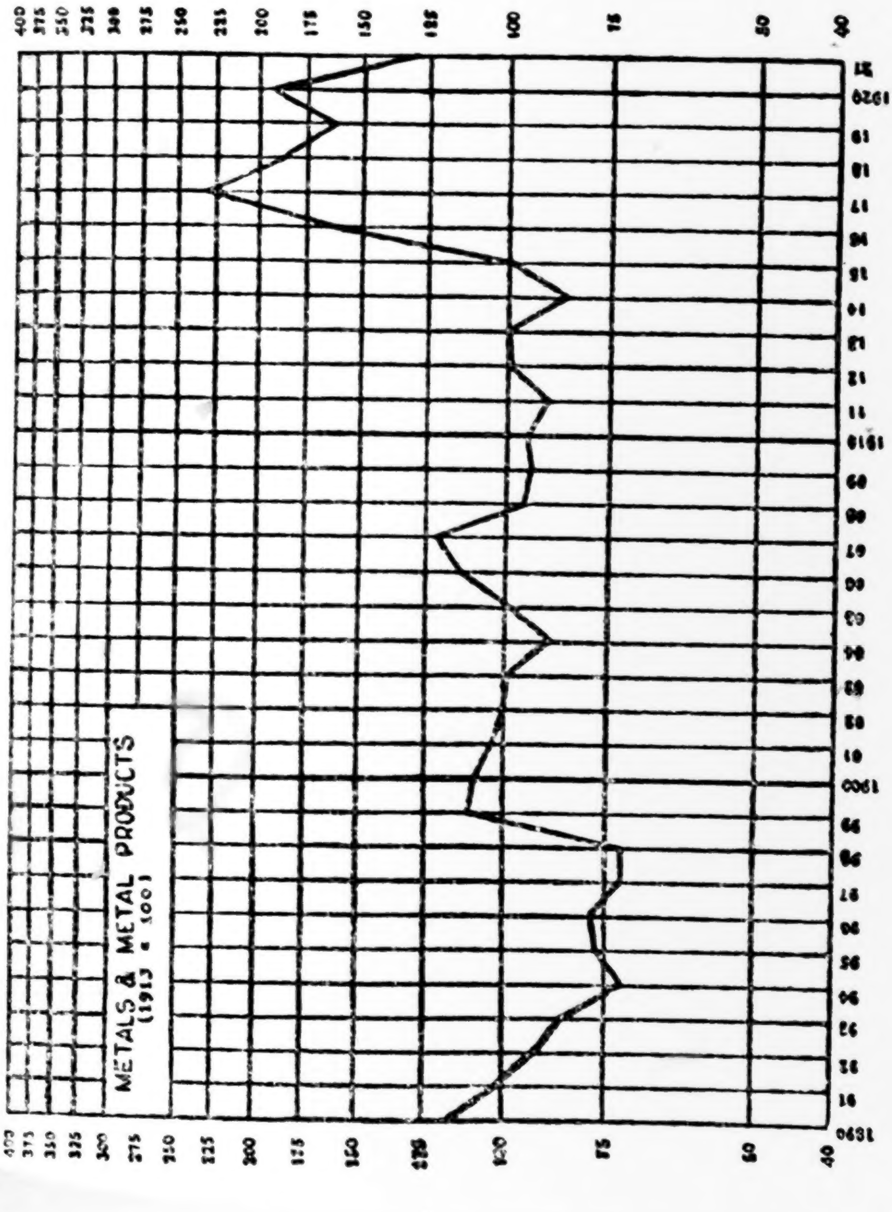
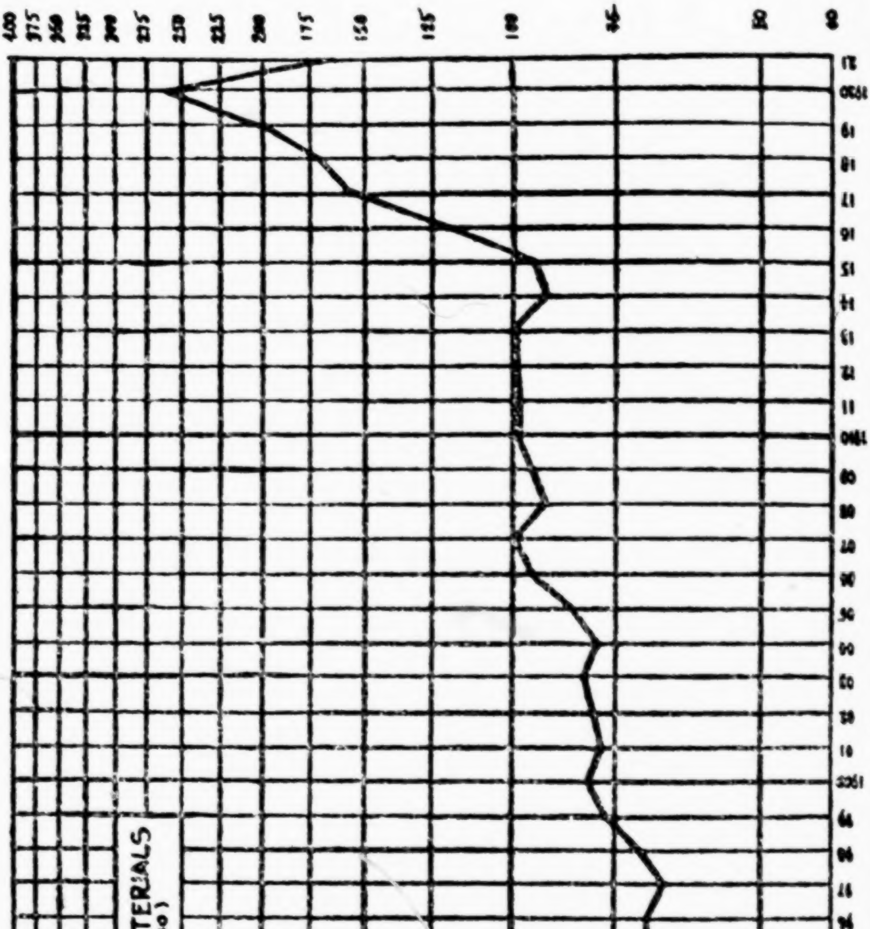


CHART 6.

109–110

CHART 7



111 Our company had an audit each year by Price, Waterhouse & Company for a good many years. The annual audits for the period from 1908 to 1913 inclusive were found correct so far as I know.

The respondent offers in evidence the annual audits of Price, Waterhouse & Company for the period of 1908 to 1913 showing the balance sheets, earnings, records of the business done each year.

(Objected to by the petitioner on the ground of irrelevancy.)

Objection sustained.

Respondent's counsel then moved for a continuance.

Mr. L. C. **Mitchell** testified as follows:

My name is Leonard C. Mitchell. I am special attorney in the office of the general counsel, Bureau of Internal Revenue. I have been charged with representing the commissioner in the present appeals and in performing that duty I have had negotiations with Mr. Oppenheim, counsel for the appellant, and we discussed the possible settlement of the appeals. We have also discussed the general manner in which we wanted to present the case. Those discussions have taken place, my recollection of the last one is that it was about a month ago. At that time we reached an understanding as to some evidence which would be introduced. Mr. Oppenheim indicated that he desired to introduce evidence as to earnings of his company from 1913 down to perhaps 1920 or even later. I indicated to him I desired to introduce in evidence balance sheets, operations and earnings of the company for about five years prior to 1913. He left with me for inspection the annual audits of his company made by Price, Waterhouse & Company. I indicated I wanted to introduce those books in evidence and we reached an agreement that if I would not object to the evidence he desired to offer as to what the company had done after 1913, he would not object to my offering those books just as they stood. I tried the case on the full reliance of that understanding. Had it not been for that understanding, I would have objected to the evidence offered as to what took place after 1913 because I doubted if it was material. I have made no objection for the sole reason that I understood I would be able to offer the
112 books. Without the books, the commissioner's case is fatally handicapped. The commissioner would never have tried the case in the way he has except that he relied upon the promise and agreement which I have already outlined.

William S. Oppenheim being called as a witness on behalf of the petitioner, after being first duly sworn, testified:

My name is William S. Oppenheim. I am attorney and a resident of Chicago, Illinois. In December last I saw Mr. Mitchell and endeavored to compromise this case. We brought with us for the purpose of taking up this compromise the reports of Price, Waterhouse & Company, auditors. I stated to Mr. Mitchell that those reports were accurate and that they were as truthful as the books. He looked over those and I came back again in January to see him as to whether we could affect a settlement. The question then came up as to whether or not these reports of Price, Waterhouse & Company could be used in evidence instead of the books. I told him that there was no objection on our part to introducing these reports in evidence so far as they were competent. I made no agreement with him that we should introduce the reports regardless of their relevancy. I also stated to him that if those reports were introduced in evidence, I wanted to reserve the right to introduce subsequent reports of Price, Waterhouse and Company, but I did not agree with him, and never agreed with him, that matters should be introduced in evidence here which were irrelevant to this issue. It was only so far as anything in these reports were relevant to the issue that they could be introduced instead of the books. That was my clear understanding and I never dreamed of consenting on the part of my client that evidence should be introduced which was not relevant and material and which ought not to be introduced.

The Member. Have you any objection, Mr. Oppenheim, to these reports going in for the purpose of the board simply perusing them, the balances and income?

Mr. Oppenheim. Not at all.

The Member. Well I think we had better receive them for that purpose certainly. I can not quite see the relevance of this at all, but I think if I am going to err at all, it had better
113 be on account of taking evidence that is immaterial, so I will
receive those reports simply for the purpose of considering the balance sheets and income statements, these being, I assume, simply the reflection of the books.

Mr. Oppenheim. Then may I have this understanding? That if it is necessary for us to get up a certificate of evidence, that the Board will only put into that certificate of evidence such portion of these reports as it deems relevant to the issue?

The Member. Yes; you certainly may have that understanding.

Mr. Price. Is the effect of what your honor has stated merely that when we turn over the whole reports to you to study, ad lib, so far as the evidence is concerned, only the balance sheets and earning statements are offered in evidence and accepted as such?

The Member. That is correct.

The member further stated: "The auditor's reports, however, will be received in evidence as reflecting correct balance sheets and as reflecting correct income of taxpayer for these years. Now you have the witness here I would suggest that you put the witness on the stand for the purpose of bringing out the transfers which are referred to."

Mr. Forward is recalled by respondent's counsel and his cross-examination was continued by Mr. Mitchell.

In 1908 we made an adjustment on the property account and put on all of the plants at an appraised value, except the Chicago plant, of which we did not have an appraisal. The Grand Rapids plant was written upon the books at the figure of $246,791.25, which was the appraised reproductive value. That represented an excess of $80,683.02 over the former book value. In other words, we wrote up that plant $80,000 on account of our appraisal. The former figure represented cost.

The Marion plant was placed upon our books, as a result of the appraisal, at $256,054.03 and that represented a write-up over the former figures of $70,694.22.

The revised figures on the Jersey City plant, based upon the appraisal, are $79,917.26, which represented a write-up over the former figures of $12,724.57. The former figure was the cost, plus additions. In case of the Detroit plant, we revised the figures to $158,000. That figure resulted from the appraisal. It represented
a write-up over our former figures, representing cost plus
114 additions, of $21,765.92. We had an appraisal of our Chicago
plant in 1915, but did not have an appraisal on or about 1908,
for it was not finished in 1908. Referring to the Chicago plant in Exhibit 5 of this same report, the figure of $439,247.92 does not show a revised valuation of December 31, 1908. That double star there shows its cost. That figure represents the value which was on our books on December 31, 1908. I find a double star with a note attached to the double star and the note reads: "Cost value used, appraised value, $349,835.90." I don't know where that appraisal comes from. The data you are referring to says "Cost value used." If that is an appraisal figure, it would simply refer to the buildings and contents and this figure of $439,000 up here also includes real estate. There is a note in the appraisal reading "Cost value used, appraised value $349,835.90." The note refers to the Chicago plant, but I don't know of any appraisal at that time. I know that none of the appraisers we have had appraised the real estate. They refused to do that. There was no appraisal of the Robey Street plant at Chicago except that of 1915. The note under that "No appraisal at or about 1908." If there was an appraisal, I don't know what is contained in it, but I do know that there was no appraisal made. That note which has been referred to has never been challenged in any way that I know of. As a matter of fact, the 1915 appraisal of the Chicago plant was a good deal less than that note.

There is an entry of book value of the Jersey City plant in the Price, Waterhouse & Company report ending December 31, 1912 of $79,580.75. There is a further entry showing proceeds from sale of Jersey City plant, $54,845.00, and an entry of "less expense thereon, $6069.38," and another entry indicating that the machinery is transferred from the Jersey City plant to another plant, of a book value of $3641.00.

There is a discussion in the report of the acquisition of the Franklin Steel Company plant. The entries indicate that our company paid for that plant $195,749.49 and an entry that the properties so acquired were taken into the books of the company at the values based on appraisals made of the properties in October 1909, to which was added the cost or actual expenditures incurred since up to the date of acquisition. According to their calculations, the second value of the capital assets acquired was $306,356.71. The account shows that there is an excess of the sound value over the amount paid for the plant of $148,244.09. In that transaction certain cash and inventories and unexpired insurance also entered in. This book also shows that on account of the appraisal, property so acquired was entered on the books of our company at a value of $148,244.09 over the cost. That $148,000 applies to plant, machinery, and equipment. The report shows that on May 5, 1913 a fire occurred to the Franklin plant and a certain adjustment was made with fire insurance companies. The adjustment referred to was a satisfactory settlement. The book value of the property destroyed was $179,599.48, and the amount of depreciation provided for on the books in respect thereof was $24,315.74, leaving a net book value of the property destroyed of $155,283.74 and the insurance recovered, as settled by the fire adjuster, was $111,347.27, and the value of the salvaged property was $40,990.00 and the insurance recovered, plus the salvage, when taken from the net book value of the property destroyed, left a balance of $2951.47.

115

Mr. MITCHELL. That is all.

The MEMBER. The auditor's reports, or rather the balance sheets and income statements contained in those reports, those auditor's reports from 1908 to 1913 will be received in evidence as respondent's Exhibits C, D, E, F, G, and H, respectively.

The Documents so identified and received in evidence were marked "Respondents Exhibits C, D, E, F, G, and H," and are in words and figures as follows:

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Respondent's Exhibit C

Chicago Railway Equipment Company

STATEMENT OF EARNINGS AND INCOME FOR YEAR ENDING DECEMBER 31, 1908

Gross earnings from operations after deducting regular repair and maintenance charges, but before providing for depreciation and accruing renewals of plant and equipment:		
Railway equipment plants (Exhibit III–a)	$201, 393. 28	
Less losses on malleable castings (Exhibit III–b)	24, 294. 06	
		$177, 099. 22
Add miscellaneous income for discount and interest earned and mileage rebates received		12, 898. 72
Total earnings and income from all sources		189, 997. 94

Deduct expenses:		
Sales department	$52, 462. 61	
General administration	40, 306. 57	
General manager's	20, 000. 00	
Directors' expenses	1, 952. 29	
Leasehold rentals	2, 652. 75	
		$118, 374. 22
Balance net earnings and income from operations		71, 623. 72
Less bond interest		7, 525. 00
Net profits for the year from operations		64, 098. 72
Deduct extraordinary charges and expenses:		
Special provision for depreciation of inventories	$23, 260. 49	
Legal expenses in connection with acquisition and infringement of patents	16, 953. 38	
Moving expenses	4, 642. 94	
		44, 856. 81
Surplus net earnings and income for the year		19, 241. 91
Add surplus at December 31, 1907, per published account		2, 586, 700. 24
		2, 605, 942. 15
Deduct:		
Dividends paid	$173, 602. 47	
Net adjustments as per statement attached (Exhibit IV)	2, 044, 414. 86	
		2, 218, 017. 33
Balance, as per balance sheet		387, 924. 82

117–118

BALANCE SHEET DECEMBER 31, 1908

ASSETS

Property account:			
Real estate, buildings, machinery, patents, and good will, as per balance sheet December 31, 1907		$4, 114, 194. 88	
Office furniture and fixtures at Chicago, Detroit, and Jersey City		3, 910. 03	
		4, 118, 104. 91	
Add—Amount of depreciation deducted in above figures and now transferred		41, 341. 26	
		4, 159, 466. 17	
Add—Expenditures during the year on additions and extensions to plants		201, 476. 31	
		4, 360, 922. 48	
Less:			
Obsolete and dismantled plants and construction written off and lease rentals transferred	$18, 233. 82		
Franchises, patents, and good will written off to surplus	2, 412, 477. 60		
		2, 430, 711. 42	
Balance (made up as under)		1, 930, 211. 06	
Real estate, buildings, machinery, plant and equipment at Chicago, Marion, Grand Rapids, Detroit, and Jersey City, on basis of reproductive valuations of American Appraisal Company, for all properties except the Chicago plant, which is stated at cost		1, 180, 211. 06	
Good will and patents		750, 000. 00	
			$1, 930, 211. 06

Current assets (at Chicago, Detroit, Jersey City, Grand Rapids, Marion, Montreal, and Walkerville):		
Inventories of raw materials, supplies, and finished product	$642,658.54	
Accounts and bills receivable	298,167.59	
Investments	8,010.00	
Cash on hand, in bank, and on special deposit	354,519.00	
Total current assets		$1,303,355.13
Deferred charges to future operations		14,719.53
		3,248,285.72

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LIABILITIES

Capital liabilities:			
Capital stock—			
Authorized—250,000 shares of $10 each changed February 4, 1909, to 25,000 shares of $100 each		$2,500,000.00	
Less—In treasury		20,000.00	
			$2,480,000.00
Bonds—			
First mortgage 5% coupon, created and retired		300,000.00	
Second mortgage 5% coupon, created		500,000.00	
Less—			
Retired	$350,000.00		
In treasury	12,000.00		
		362,000.00	
			138,000.00
Total capital liabilities			2,618,000.00
Accounts payable and miscellaneous accrued items			117,360.90
Reserves:			
For depreciation and accruing renewals		$100,000.00	
For contingencies		25,000.00	
			125,000.00
Surplus:			
Balance at December 31, 1908, after deducting amount written off good will and after effecting other miscellaneous adjustments			387,924.82
Dividends paid during 1908 and charged to surplus account, $173,602.47.			
			3,248,285.72

120

Respondent's Exhibit D

Chicago Railway Equipment Company

STATEMENT OF PROFITS AND INCOME YEAR ENDING DECEMBER 31, 1909

Gross earnings from operations, after deducting regular repair and maintenance charges, but before providing for depreciation and accruing renewals of plant and equipment:		
Railway equipment plants (Exhibit III-a)	$365,615.82	
Less losses on malleable castings (Exhibit Exhibit III-b)	8,110.44	
		$348,505.38
Add miscellaneous income for discount and interest earned and rentals received		25,776.06
Total profits and income from all sources		374,281.44

Deduct expenses:		
Sales department	$57, 478. 53	
General administration	45, 622. 46	
General manager's salary	20, 000. 00	
Directors expenses	1, 775. 00	
Special engineer's salary & expenses	3, 871. 12	
Leasehold rentals	3, 652. 76	
Reserve for bad and doubtful accounts	2, 500. 00	
		$134, 899. 87
Balance net earnings and income from operations		239, 381. 57
Less bond interest		4, 425. 00
Net profits for the year from operations		234, 956. 57
Deduct:		
Extraordinary charges and expenses, special provision for depreciation of buildings, plant, machinery, and equipment, etc	$30, 000. 00	
Appropriation to restore contingent fund to $20,000.00	11, 494. 30	
		41, 494. 30
Surplus net earnings and income for the year		193, 462. 27
Add: Surplus at December 31, 1908, as per published account		387, 924. 8
		581, 387. 09
Deduct:		
Charges during the year for 1908 taxes, adjustment to inventory, etc	$6, 067. 60	
Dividends paid and accrued	173, 600. 17	
		179, 667. 77
Surplus as per balance sheet		401, 719. 32

121-122

Balance Sheet December 31, 1909

ASSETS

Property account:			
Real estate, buildings, machinery, plant, and equipment at Chicago, Marion, Grand Rapids, Detroit, and Jersey City, based on the reproductive valuations furnished by the American Appraisal Co., for all properties except the Chicago plant, which is stated at cost with the expenditures since added—			
Balance at December 31, 1908	$1, 180, 211. 06		
Net additions during the year	36, 569. 63		
		$1, 216, 780. 69	
Good will and patents—			
Balance at December 31, 1908	750, 000. 00		
Expended on new patents, etc	9, 098. 46		
		759, 098. 46	
			$1, 975, 879. 15
Current assets (at Chicago, Detroit, Jersey City, Grand Rapids, Marion, Montreal, and Walkerville)—			
Inventories of raw materials, supplies, and finished products		655, 186. 44	
Advances against materials		20, 673. 18	
Investments and advances		18, 010. 00	
Accounts and bills receivable (less reserve)		423, 786. 10	
Cash on hand, in banks and on special deposit		186, 513. 51	
Total current assets			1, 304, 169. 23

Property account—Continued.			
Deferred charges to future operations—			
Prepaid royalties and insurance and lease rentals on unimproved real estate			$17,271.48
			3,297,319.86

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LIABILITIES

Capital liabilities:			
Capital stock—			
Authorized—25,000 shares of $100 each		$2,500,000.00	
Less—			
In treasury—175 shares	$17,500.00		
Held for exchange for shares of $10 each—147 shares	14,700.00		
		32,200.00	
1,470 shares of $10 each, not yet exchanged		14,700.00	
			2,482,500.00
Bonded indebtedness—			
First mortgage 5% coupon bonds created and retired	$300,000.00		
Second mortgage 5% coupon bonds		500,000.00	
Less—			
Retired	400,000.00		
In treasury	11,000.00		
		411,000.00	
			89,000.00
Current liabilities:			
Bills and accounts payable and miscellaneous accrued items		148,791.60	
Dividend No. 53 declared and unpaid		43,400.03	
			192,191.63
Reserves:			
For contingencies		20,000.00	
For depreciation and accruing renewals—			
Balance at December 31, 1908	$100,000.00		
Less—Expenditures charged off	18,091.09		
	81,908.91		
Add—Appropriations from earning during the year	30,000.00		
		111,908.91	
			131,908.91
Surplus:			
Note: There is a contingent liability under the company's guarantee, as to principal and interest of bonds of other companies amounting to		200,000.00	
Of which the company has contracted to purchase at par		150,000.00	
			3,297,319.86

Respondent's Exhibit E

Chicago Railway Equipment Company

STATEMENTS OF PROFITS AND INCOME YEAR ENDING DECEMBER 31, 1910

Gross Earnings from operations, after deducting regular Repair and Maintenance charges, but before providing for Depreciation and Accruing Renewals of Plant and Equipment:		
Railway equipment plants as per Exhibit III	$525, 746. 01	
Less—Losses on malleable castings (Exhibit III-a)	11, 770. 48	
		$513, 975. 53
Add—		
Miscellaneous income from discount and interest earned and rentals received	20, 450. 48	
Profits on exchange of brake beams	2, 496. 95	
		22, 947. 43
Total profits and income from all sources		536, 922. 96
Deduct expenses:		
Sales department	68, 243. 54	
General and administration	49, 802. 45	
General manager's salary	20, 000. 00	
Directors' expenses	1, 501. 50	
Leasehold rentals	3, 652. 76	
		143, 200. 25
Balance, gross earnings from operations		393, 722. 71
Deduct interest and other charges:		
Interest on bonded and floating debt	11, 358. 32	
Provision for depreciation and accruing renewals of buildings, plant, machinery, and equipment	50, 000. 00	
Reserve against possible shrinkage in inventory valuations	25, 000. 00	
Appropriation to restore contingent fund to $20,000.00	12, 150. 37	
		98, 508. 69
Surplus net earnings and income for the year, carried to surplus		295, 214. 02

EXHIBIT II-a—SURPLUS ACCOUNT

Dr.		Cr.	
Dividends paid	$173, 906. 25	Balance at December 31, 1909 as per published account	$401, 719. 32
Balance surplus at December 31, 1910 as per balance sheet	523, 027. 09	Surplus net earnings and income for the year as above	295, 214. 02
	696, 933. 34		696, 933. 34

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Balance Sheet December 31, 1910

ASSETS

Property account:			
Real estate, buildings, machinery, plant & equipment at Chicago, Marion, Grand Rapids, and Jersey City, based on the reproductive valuation furnished in the years 1907 and 1908 by the American Appraisal Co., with the expenditures added since, for all properties except the Chicago plant, which is stated at cost to date—			
Balance at December 31, 1909	$1,216,780.69		
Net additions during the year	31,213.34		
		$1,247,994.03	
Goodwill and patents—			
Balance at December 31, 1909	759,098.46		
Expended on new patents, etc	8,621.33		
		767,719.79	
			$2,015,713.82
Current assets (at Chicago, Detroit, Jersey City, Grand Rapids, Marion, Montreal, and Walkerville):			
Inventories of raw materials, supplies, and finished products		579,589.01	
Investments and advances		168,010.00	
Accounts and bills receivable and cash		550,415.42	
Total current assets			1,298,014.43
Deferred charges to future operations			20,149.38
			3,333,877.63

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LIABILITIES

Capital liabilities:			
Capital stock—			
Authorized—25,000 shares of $100.00 each		$2,500,000.00	
Less—			
In treasury—150 shares	$15,000.00		
Held for exchange for shares of $10.00 each—146 shares	14,600.00		
		29,600.00	
		2,470,400.00	
1,460 shares of $10.00 each not yet exchanged for shares of $100.00 each		14,600.00	$2,485,000.00
Bonded indebtedness—			
First mortgage 5% coupon bonds created and retired	$300,000.00		
Second mortgage 5% coupon bonds		500,000.00	
Less—			
Retired and canceled	$450,000.00		
In treasury	12,000.00		
		462,000.00	
			38,000.00

Current liabilities:			
Trade accounts payable and miscellaneous accrued items			$85,924.81
Reserves:			
For contingencies		$20,000.00	
For possible shrinkage in inventory valuations		25,000.00	
For depreciation and accruing renewals—			
Balance at December 31, 1909	$111,908.91		
Less—Expenditure charged off	4,973.18		
	106,925.73		
Add—Appropriations from earnings during the year	50,000.00		
		156,925.73	
			201,925.73
Surplus			523,027.09
(Dividends paid during 1910 and charged to surplus account—$173,906.25.)			
			3,333,877.63

128 *Respondent's Exhibit F*

Chicago Railway Equipment Company

STATEMENTS OF PROFITS AND INCOME FOR THE YEAR ENDING DECEMBER 30, 1911

Gross earnings from operations, after deducting regular repair and maintenance charges, but before providing for depreciation and accruing renewals of plant and equipment:		
Railway equipment plants as per Exhibit III	$259,503.49	
Less—Losses on malleable castings (Exhibit III-a)	792.97	
		$258,710.52
Add—Miscellaneous income from discount and interest earned and rentals received		18,344.16
Total profits and income		277,054.68
Deduct—Expenses:		
Sales department	$69,227.80	
General and administration	45,150.02	
General manager's salary	20,000.00	
Directors' expenses	1,100.00	
Leasehold rentals	1,207.49	
		136,685.31
Balance—Gross earnings from operations		140,369.37
Deduct—Interest and other charges:		
Interest on bonded indebtedness	950.00	
Appropriation for contingent fund	253.77	
Reserve for corporation tax	1,000.00	
Provision for depreciation and accruing renewals of buildings, plant, machinery, and equipment	30,000.00	
		32,203.77
Surplus net earnings and income for the year carried to surplus account		108,165.60

Exhibit II-a—Surplus Account

Dr.		Cr.	
Dividends paid	$173, 950. 00	Balance at December 31, 1910, as per published accounts	$523, 027. 09
Balance—Surplus at December 31, 1911, as per balance sheet	457, 242. 69	Surplus net earnings and income for the year as above	108, 165. 60
	631, 192. 69		631, 192. 69

Balance Sheet December 30, 1911

129–130

ASSETS

Property account:			
Real estate, buildings, machinery, plant, and equipment at Chicago, Marion, Grand Rapids, Detroit, and Jersey City, based on the reproductive valuation furnished in the years 1907 and 1908 by the American Appraisal Co., with expenditures added since, for all properties except the Chicago plant, which is stated at cost to date—			
Balance at December 31, 1910	$1, 247, 994. 03		
Net additions during the year	126, 305. 20		
		$1, 374, 299. 23	
Goodwill and patents—			
Balance at December 31, 1910	767, 719. 79		
Expended on new patents, etc	2, 631. 82		
		770, 351. 61	
			$2, 144, 650. 84
Current assets (at Chicago, Detroit, Jersey City, Grand Rapids, Marion, Montreal, and Walkerville):			
Inventories of raw materials, supplies, and finished products		485, 803. 71	
Investments and advances (including cost, at 95%, of $158,000.00 par value of bonds of another company)		169, 285. 00	
Accounts and bills receivable		265, 700. 79	
Cash		159, 305. 83	
Total current assets			1, 080, 095. 33
Deferred charges to future operations			13, 831. 26
			3, 238, 577. 43

131

LIABILITIES

Capital liabilities:			
Capital stock—			
Authorized—25,000 shares of $100.00 each		$2, 500, 000. 00	
Less—			
In treasury—150 shares	$15, 000. 00		
Held for exchange for shares of $10.00 each—146 shares	14, 600. 00		
		29, 600. 00	
		2, 470, 400. 00	
1,460 shares of $10.00 each not yet exchanged for shares of $100.00 each		14, 600. 00	
			$2, 485, 000. 00

Current liabilities:			
Trade accounts payable		$50, 519. 03	
Miscellaneous accrued items		28, 865. 15	
			$79, 384. 18
Reserves:			
For contingencies		15, 000. 00	
For possible shrinkage in inventory valuations		25, 000. 00	
For depreciation and accruing renewals—			
Balance at December 31, 1910	$156, 925. 73		
Less—Expenditures charged off	9, 975. 17		
	146, 950. 56		
Add—Appropriations from earnings during the year	30, 000. 00		
		176, 950. 56	
			216, 950. 56
Surplus			457, 242. 69
(Dividends paid during 1911 and charged to surplus account—$173,950.00.)			
			3, 238, 577. 43

132 *Respondent's exhibit G*

Chicago Railway Equipment Company

STATEMENT OF PROFITS AND INCOME FOR THE YEAR ENDING DECEMBER 31, 1912

Gross earnings from operations, after deducting regular repair and maintenance charges, but before providing for depreciation and accruing renewals of plant and equipment:		
Railway equipment plants as per Exhibit III	$400, 162. 11	
Add—Profits from operations of auxiliary plants—		
Malleable iron plants (Exhibit III–a)	71, 138. 96	
Franklin rolling mill (Exhibit III–a)	23, 371. 91	
Total gross earnings from operations		$494, 672. 98
Add—Miscellaneous income from discount and interest earned and rentals received, etc		17, 112. 04
Total earnings and income		511, 785. 02
Deduct expenses:		
Sales department	66, 938. 69	
General and administration	45, 035. 42	
General manager's salary	20, 000. 00	
Directors' fees	1, 700. 00	
		133, 674. 11
Balance gross profits		378, 110. 91
Deduct—Interest and other charges:		
Interest on bills payable	9, 354. 93	
Appropriation to restore inventory reserve to $25,000.00, less excess provision in contingent fund $545.39 written back	2, 304. 56	
Reserve for corporation tax	3, 700. 00	
Provision for depreciation and accruing renewals	50, 000. 00	
		65, 359. 49
Surplus net earnings and income for the year carried to surplus account		312, 751. 42

EXHIBIT II-A—SURPLUS ACCOUNT

Dr.		Cr.	
Loss on sale of Jersey City plant	$24, 464. 13	Balance at December 31, 1911, as per published accounts	$457, 242. 69
Advance payment on account of Lipschultz-Wolf royalties written off	4, 605. 50	Profit on acquisition of Franklin Steel Co. business and plant	147, 299. 09
Dividends paid	174, 020. 00	Surplus net earnings and income for year as above	312, 751. 42
Transferred to general reserve	500, 000. 00		
Balance—Surplus at Dec. 31, 1912, as per balance sheet	214, 203. 57		
	917, 293. 20		917, 293. 20

133–134 **BALANCE SHEET DECEMBER 31, 1912**

ASSETS

Property Account:			
Real Estate, Buildings, Machinery, Plant and Equipment at Chicago, Marion, Grand Rapids, and Detroit based on reproductive values furnished in the years 1907 and 1908 by the American Appraisal Company, with expenditures added since for all properties except the Chicago plant, which is stated at cost to date—			
Balance at December 31, 1911	$1, 374, 299. 23		
Add—Additional properties acquired as at June 30, 1912, as valued by American Appraisal Company in 1909, plus expenditures added since, less properties sold during the year	274, 354. 62		
Additional expenditures to all properties during the year	77, 681. 52		
		$1, 726, 335. 37	
Good will and patents—			
Balance at December 31, 1911	770, 351. 61		
Expended on new patents, etc	2, 690. 08		
		773, 041. 69	
			$2, 499, 377. 06
Current assets (at Chicago, Detroit, Grand Rapids, Marion, Franklin, and Montreal):			
Inventories of raw materials, supplies, and finished products		804, 958. 27	
Investments		19, 285. 00	
Accounts and bills receivable and cash		733, 531. 22	
Total current assets			1, 557, 774. 49
Deferred charges to future operations			1, 759. 21
			4, 058, 910. 76

LIABILITIES

Capital liabilities:			
Capital stock—			
Authorized—25,000 shares of $100.00 each		$2, 500, 000. 00	
Less—			
In treasury — 140 shares of $100 each	$14, 000. 00		
Held for exchange for shares of $10.00 each	14, 600. 00		
		28, 600. 00	
		2, 471, 400. 00	
1,460 shares of $10.00 each not yet exchanged for shares of $100.00 each		14, 600. 00	
			$2, 486, 000. 00
Current liabilities:			
Bills payable		300, 000. 00	
Trade liabilities and miscellaneous accrued items		255, 537. 87	
			555, 537. 87
Reserves:			
For contingencies		10, 000. 00	
For possible shrinkage in inventory valuations		25, 000. 00	
For depreciation and accruing renewals—			
Balance at January 1, 1912	$176, 950. 56		
Add—			
Depreciation on new properties accrued to date of acquisition	47, 618. 66		
Appropriated from earnings for the year	50, 000. 00		
Other accretions	1, 716. 58		
	276, 285. 80		
Less — Expenditures charged off	8, 116. 48		
		268, 169. 32	
General reserve transferred from surplus (as under)		500, 000. 00	
			803, 169. 32
Surplus, including surplus arising from acquisition of additional properties and net earnings for the year, less dividends paid		714, 203. 57	
Deduct—Amount transferred to general reserve (above)		500, 000. 00	
Balance, undivided profits carried forward			214, 203. 57
(Dividends paid during 1912 and charged to Surplus Account—$174,020.00.)			
			4, 058, 910. 76

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Respondent's Exhibit II

Chicago Railway Equipment Company

STATEMENTS OF PROFITS AND INCOME FOR THE YEAR ENDING DECEMBER 31, 1913

Gross earnings from operations, after deducting regular repair and maintenance charges, but before providing for depreciation and accruing renewals of plant and equipment:		
Railway equipment plants, as per Exhibit III	$435, 438. 84	
Add—Profits from operations of auxiliary plants—		
Malleable iron plants (Exhibit III–A)	178, 349. 77	
Franklin rolling mill (Exhibit III–A)	18, 662. 75	
Total gross earnings from operations		$632, 451. 36
Add—Miscellaneous income from discount and interest earned and rentals received, etc		13, 300. 82
Total earnings and income		645, 752. 18
Deduct—Expenses:		
Sales department	76, 592. 52	
General and administration	48, 503. 39	
General manager's salary	22, 500. 00	
Directors' fees	1, 550. 00	
Special legal expenses	2, 602. 78	
		151, 748. 69
Balance—Gross profits		494, 003. 49
Deduct—Interest and other charges:		
Interest on bills payable	12, 666. 28	
Appropriated for inventory reserves	20, 000. 00	
Appropriated for contingent fund	1, 000. 00	
Reserve for corporation tax	3, 900. 00	
Provision for depreciation and accruing renewals	50, 000. 00	
Reserve for doubtful accounts	2, 020. 10	
		89, 586. 38
Surplus net earnings and income for the year carried to Surplus Account		404, 417. 11

EXHIBIT II–A—SURPLUS ACCOUNT

Dr.		Cr.	
Shortage in bar stock inventory Franklin plant at date of acquisition	$15, 859. 09	Balance—Surplus at December 31, 1912, as per balance sheet	$214, 203. 57
Fire loss—Franklin plant written off	13, 641. 03	Surplus net earnings and income for the year, as above	404, 417. 11
Dividends paid	174, 020. 00		618, 620. 68
Balance—Surplus as per balance sheet December 31, 1913	415, 100. 56		
	618, 620. 68		

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BALANCE SHEET DECEMBER 31, 1913

ASSETS

Property accounts:			
Real estate, buildings, machinery, plant, and equipment at Chicago, Marion, Grand Rapids, Detroit, and Franklin based on reproductive values furnished in the years 1907, 1908, and 1909 by the American Appraisal Company, with expenditures added since, for all properties except Chicago plant, which is stated at cost to date—			
Balance at December 31, 1912	$1, 726, 335. 37		
Add—Additional expenditures to all properties during the year	70, 808. 15		
	1, 797, 143. 52		
Deduct—Book value of property destroyed by fire in May, 1913, still to be replaced at December 31, 1913	110, 714. 78		
		$1, 686, 428. 74	
Good will and patents—			
Balance at December 31, 1912	773, 041. 69		
Expended on new patents, etc	1, 853. 65		
		774, 895. 34	
			$2, 461, 324. 08
Current assets (at Chicago, Detroit, Grand Rapids, Marion, Franklin, and Montreal):			
Inventories of raw materials, supplies, and finished products		867, 873. 49	
Investments at book value		19, 485. 00	
Accounts and bills receivable		489, 267. 43	
Cash on hand, in banks, and on special deposit		104, 879. 84	
Total current assets			1, 481, 505. 76
Deferred charges to future operations:			
Prepaid insurance premiums, etc			1, 789. 07
			3, 944, 618. 91

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LIABILITIES

Capital liabilities:			
Capital stock—			
Authorized—25,000 shares of $100.00 each		$2, 500, 000. 00	
Less—			
In treasury—140 shares of $100.00 each	$14, 000. 00		
Held for exchange for shares of $10.00 each	14, 600. 00		
		28, 600. 00	
		2, 471, 400. 00	
1,460 shares of $10.00 each not yet exchanged for shares of $100.00 each		14, 600. 00	
			$2, 486, 000. 00

Current liabilities:			
Bills payable		$100,000.00	
Trade liabilities and miscellaneous accrued liabilities		114,563.18	$214,563.18
Reserves:			
For contingencies		10,000.00	
For possible shrinkage in inventory valuations		45,000.00	
For depreciation and accruing renewals—			
Balance at December 31, 1912	$268,169.32		
Add — Appropriation from earnings for the year	50,000.00		
	318,169.32		
Less—Renewal expenditures and book value of dismantled property written off	44,214.15		
		273,955.17	
General reserve		500,000.00	
			828,955.17
Undivided profit			415,100.56
(Dividends paid during 1913 and charged to undivided profit account, $174,020.00.)			
			3,944,618.91

140 The **Member**. The board will not give weight to anything except those balance sheets and the income statements and of course anything that has been brought out by Mr. Mitchell here which is in the record already.

Redirect examination by Mr. **Oppenheim**:

When I speak of the cost of the property of the Marion plant, Franklin plant, and the Grand Rapids plant, I mean the price we paid for the place plus any additions we made at the time the appraisal was put on the books. I don't mean the original cost of the construction of those buildings. I recall that the commissioner fixed power at $355,054.06. I did not intend to state that that represented power plus certain piping and shafting and things of that kind which convey the power. In that total that Mr. Mitchell had a short time ago, there was one column there that we figured depreciation on at seven and one-half per cent. I refer to the table attached to the letter of November 16, 1922. This is the column on which we figured that seven and one-half per cent. would be a fair depreciation which included the items that we call power and also of electric machinery, such as motors, transformers, and the entire item of piping and fixtures. Those were agreed on in the sense that the three were related to power and were related to the percentage of depreciation that we thought it was fair to allow. It was merely a coincidence that the figure I made up and claimed equals this figure the commissioner allows. I don't know where the commissioner got this $355,000, but it had nothing to do with the making up of that figure there.

My proposition is that when the commissioner insists that the power shall be depreciated at 5% that the machinery and equipment are entitled to depreciation at 10%. In that statement we had a lot of machinery that is very delicate and it depreciates rapidly, such as molding machinery, tumbling barrels in the foundry, and sand blast equipment, which only lasts three, four, or five years at the best, and we tried to divide the property up as far as we could into those different classifications. I guess we had eight or ten of them probably, and when the commissioner wanted to make it only five and when that was the figure which he used and he figured on taking in 15 and 20% machinery and putting it in with 5% machinery, we thought probably 10% would not be far off, so we did not argue that point at all.

141 The Chicago plant was erected in 1907 and it was not finished until 1908. We went in in December, 1907, but it was not finished. It did not have any windows in it and no fires for heating, etc. We had to get out of the old plant before January 1st.

The Coats and Burchards' appraisal was $8,000.00 less than our costs figures on the Robey Street plant. That variation Mr. Mitchell referred to was undoubtedly due to the fact that the $400,000.00 odd figure includes the real estate as well as the Princeton Avenue property.

Mr. Mitchell moves to strike out the answer as being a conclusion.

The Member. I think it clear that there was an appraisal of the Chicago plant in 1915. He has referred to the appraisal made at that time, and Mr. Oppenheim has asked him if the appraisal corresponds with the book figures at that time, and the witness states that the appraisal was $8,000.00 less than the book figures.

Mr. Mitchell. I guess I misunderstood, your honor.

The Witness. I did not mean there was an appraisal in 1908 or 1909.

Recross-examination by Mr. Mitchell:

We had a Chicago plant before 1907 or 1908. We have had a plant in Chicago ever since we started in the 90's. We changed our location in 1907. That is, we moved from one location to another. We built a new plant in a new location in 1907 and finished it in 1908. The old location we rented and still own, but moved our machinery over to the new plant.

(Witness excused.)

The Member. That is all your case, Mr. Oppenheim?

Mr. Oppenheim. Yes, sir.

The Member. Mr. Mitchell, have you any evidence?

Mr. Mitchell. No further evidence on behalf of the commissioner.

Which was all the evidence offered or received in the above-entitled appeal.

Forasmuch, therefore, and to the end that the evidence hereinbefore set out in this statement of evidence may become a part of the record on review, the petitioner, Chicago Railway Equipment Company, now tenders its statement of evidence and respectfully prays the Board of Tax Appeals that it be allowed and signed

142 and made a part of the record in this case, which is accordingly done this 28th day of May, A. D. 1928.

Approved:

(Sgd.) Charles P. Smith,
Member United States Board of Tax Appeals.

Now, July 23, 1929, the foregoing statement of evidence certified from the record as a true copy.

B. D. Gamble,
[SEAL.] *Clerk, U. S. Board of Tax Appeals.*

Before U. S. Board of Tax Appeals

Findings of fact and opinion

Filed September 24, 1928

A true copy: Teste B. D. Gamble, clerk U. S. Board of Tax Appeals.

1. The March 1, 1913, value of depreciable property determined.
2. Additional taxes due for the years 1917, 1918, and 1919 are not barred from assessment and collection by any statutes of limitation.

William S. Oppenheimer, Esq., and Henry W. Price, Esq., for the petitioner.

L. C. Mitchell, Esq., for the respondent.

This is a proceeding for the redetermination of deficiencies in income and profits tax for the calendar years 1917, 1918, and 1919 in the respective amounts of $22,337.85, $85,815.59, and $15,609.91. This case was originally heard by the board on February 2, 1926. The assignments of error in the petition upon which the original hearing was held were:

(1) The commissioner has used erroneous values for depreciation purposes.

(2) The commissioner has allowed insufficient depreciation.

(3) The commissioner has denied deductions for bad debts ascertained to be worthless and written off within the taxable year.

The board promulgated its findings of fact and opinion therein on July 28, 1926, 4 B. T. A. 452. In that opinion the board affirmed the findings of the respondent save that it held that certain 143 bad debts aggregating $33,217.17, which the petitioner deducted from its 1918 income and which the respondent had disallowed altogether, should be deducted from the gross income of 1919. By an order entered November 4, 1926, and amended November 10, 1926, the board affirmed the respondent's determination of deficiencies for 1917 and 1918, but reduced the deficiency for 1919 from $15,609.91 to $6,309.16. The petitioner took an appeal to the United States Circuit Court of Appeals for the Seventh Circuit. That court stated in its opinion, 20 F. (2d) 10:

Three matters are here in issue on the merits: (a) Was the item allowed for bad debts properly transferred from 1918 to 1919? (b) Was there error in fixing the value of depreciable property? (c) Were the rates of depreciation used erroneous?

In the course of its opinion the court stated:

(c) Whether the depreciation rates applied were in any sense erroneous, unless possibly in the single instance of giving the corrugated-iron building the same rate as the concrete, is doubtful. The witness Forward, who knew most about the rates, said the item scheduled as " power " had a normal useful life of 20 years, and machinery of 10 years, and they were given, respectively, a 5 per cent and 10 per cent rate. He agreed to 20 per cent for the automobiles. Unless there is something to contradict the Forward testimony as to the corrugated-iron building, it would appear that should have a depreciation rate of 5 per cent. We do not think there should be an increase of 50 per cent because of the additional operation of machinery during the years in question.

The mandate of the higher court reads:

It is now here ordered and adjudged by this court that the order of the said United States Board of Tax Appeals entered November 4, 1926, and amended November 10, 1926, be and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said United States Board of Tax Appeals, with direction to take further evidence, if necessary, on any question, and to fix the market value as of March 1, 1913, and, further, to base the depreciation thereon in accordance herewith, and to allow the charge-off of bad accounts for the year 1918.

On December 30, 1927, the petitioner filed with the board a motion for " leave to file a supplemental petition in this cause instanter and to rule upon the Commissioner to answer the same." The supplemental petition accompanied the motion, and is to the effect that

> the assessment and collection of any deficiencies in tax for
> 144 the years 1917, 1918, and 1919 are barred by statutes of limita-
> tion.

The motion was granted by the board on January 16, 1928, and the supplemental petition was filed as of that date and the respondent was given 45 days within which to file his answer to such petition. The respondent's answer thereto was filed on February 20, 1928.

Rates for depreciation were settled by the prior decision of the board as modified by the decision of the court. They are:

Brick and concrete buildings	3	per	cent.
Iron and steel buildings	5	"	"
Power	5	"	"
Machinery and equipment	10	"	"
Automobiles	20	"	"

No question was raised as to the correctness of the determination of the respondent with respect to the allowable depreciation on patterns. The only questions relating to depreciation for adjudication at this time are (1) the March 1, 1913, value of depreciable properties and (2) the correct allocation between (a) power and (b) machinery and equipment at such basic date. The third question for adjudication is whether the assessment and collection of deficiencies for the taxable years are barred by statutes of limitation.

The findings of fact hereinafter stated are only such as are necessary to determine the issues raised by this proceeding.

Findings of fact

The petitioner is an Illinois corporation with its principal office at Chicago. It was organized in 1892 with a paid-up cash capital of $30,000 and succeeded to the business of the National Hollow Brake Beam Co. It acquired a one-story brick building at 4060 Princeton Avenue, Chicago, and gradually increased its plant. No additional capital was ever paid into the company. In 1901 and 1904 it constructed a plant consisting of buildings and machinery in Detroit, Michigan. Between that date and 1917 certain additions and replacements were made to that plant. In 1905, it acquired a malleable iron foundry consisting of buildings, machinery, and equipment at Grand Rapids, Michigan, at a cost of $62,500. Between that date and 1917 certain additions and replacements were made thereto. At the time this plant was purchased it was being operated by a creditors' committee. In 1906, it acquired a similar malleable
145 iron foundry which was being operated at Marion, Indiana,
at a cost of $92,000. The Marion plant was not being operated successfully by its owners and was acquired at a bargain price. Between the date of acquisition and 1917 considerable additions and replacements were made to that plant. In 1907, it constructed what is now its principal office building, a brake beam plant, at 46th and Robey Streets, Chicago, and installed therein certain machinery. In 1908, the petitioner owned plants at Chicago, Grand Rapids and Detroit, Michigan, Marion, Indiana, and Jersey City, New Jersey. It had appraisals made of these plants by the American Appraisal Co. on the dates following.

Jersey City	April 25, 1904
Detroit	Feb. 11, 1907
Grand Rapids, Mich	Dec. 12, 1907
Marion, Ind	Dec. 12, 1908

The petitioner's books of account at the beginning of 1908 reflected the actual cost of the construction and acquisition of its various properties. The appraisals made of the properties showed values in excess of cost and the book values of the plants were increased at December 31, 1908, to accord with the appraisals, the increase in value of the several plants written upon the books at that time being as follows:

Grand Rapids plant	$80,683.02
Marion, Ind., plant	70,624.32
Jersey City plant	12,724.57
Detroit, Michigan, plant	21,765.92
Total increased value of tangible property	185,797.83

The petitioner's books of account were audited annually during the years 1908 to 1913, inclusive, by Price, Waterhouse & Co., and the financial transactions of the petitioner, including acquisitions of new plants and proper amounts for depreciation, are shown in the annual audits made. In 1912, the petitioner acquired a rolling mill plant together with machinery at Franklin, Pa., at a cost of $175,000. The plant at the time was in the hands of a receiver and was acquired at a bargain price. The petitioner had an appraisal made of this property by the American Appraisal Co. in 1912, and the value of the plant at December 31, 1912, was written up on its books of account to the extent of $148,244.09 in excess of cost. The petitioner's balance sheet, as audited by Price, Waterhouse & Co., at December 31, 1912, shows as follows:

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ASSETS

Property account: Real estate, buildings, machinery; plant and equipment at Chicago, Marion, Grand Rapids, and Detroit based on reproductive values furnished in the years 1907 and 1908 by the American Appraisal Company, with expenditures added since for all properties except the Chicago plant, which is stated at cost to date—			
Balance at December 31, 1911	$1, 374, 299. 23		
Add—Additional properties acquired as at June 30, 1912, as valued by American Appraisal Company in 1909, plus expenditures added since, less properties sold during the year	274, 354. 62		
Additional expenditures to all properties during the year	77, 681. 52		
		$1, 726, 335. 37	
Good will and patents—			
Balance at December 31, 1911	770, 351. 61		
Expended on new patents, etc	2, 690. 08		
		773, 041. 69	
			$2, 499, 377. 06
Current assets (at Chicago, Detroit, Grand Rapids, Marion, Franklin, and Montreal)—			
Inventories of raw materials, supplies and finished products		804, 958. 27	
Investments		19, 285. 00	
Accounts and bills receivable		543, 137. 34	
Cash on hand, in banks, and on special deposit		190, 393. 88	
Total current assets			1, 557, 774. 49
Preferred charges to future operations			1, 759. 21
			4, 058, 910. 76

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LIABILITIES

Capital liabilities:			
Capital stock—			
Authorized—25,000 shares of $100.00 each		$2, 500, 000. 00	
Less—In treasury—			
140 shares of $100.00 each	$14, 000. 00		
Held for exchange for shares of $10.00 each	14, 600. 00		
		28, 600. 00	
		2, 471, 400. 00	
1,460 shares of $10.00 each not yet exchanged for shares of $100.00 each		14, 600. 00	
			$2, 486, 000. 00
Current liabilities:			
Bills payable		300, 000. 00	
Trade liabilities and miscellaneous accrued items		255, 537. 87	
			555, 537. 87
Reserves:			
For contingencies		10, 000. 00	
For possible shrinkage in inventory valuations		25, 000. 00	
For depreciation and accruing renewals—			
Balance at Jan. 1, 1912	$176, 950. 56		
Add—Depreciation on new properties accrued to date of acquisition	47, 618. 66		
Appropriated from earnings for the year	50, 000. 00		
Other accretions	1, 716. 58		
	276, 285. 80		
Less—Expenditures charged off	8, 116. 48		
		268, 169. 32	
General reserve transferred from surplus		500, 000. 00	
			803, 169. 32
Surplus as per Exhibit II–a			214, 203. 57
			4, 058, 910. 76

148 A detail of this balance sheet shows:

--	Buildings	Machinery, plant and loose equipment
Chicago	$246, 163. 40	$138, 030. 50
Detroit	46, 596. 34	101, 963. 26
Marion	168, 290. 14	103, 405. 46
Grand Rapids	113, 641. 54	158, 629. 16
Franklin	145, 822. 23	183, 357. 14
Total	720, 513. 65	685, 385. 53

In addition to the foregoing, the petitioner had depreciable properties at December 31, 1912, as follows:

Montreal	$200. 00
Automobiles	3, 345. 00
Patterns	43, 665. 09
Office furniture	12, 821. 35

Subsequent to March 1, 1913, the petitioner had reproductive appraisals made by Coats & Burchard Co. as follows:

Marion Malleable Iron Works, Feb. 1, 1916	$333, 455. 38
Grand Rapids Malleable Works plant, Dec. 21, 1915	354, 814. 07
Detroit Forge plant, Jan. 18, 1916	156, 185. 39
Plant 46th and Robey Sts., Chicago, Dec. 31, 1915	344, 600. 77
Franklin Steel Wks. plant, Nov. 27, 1915	493, 885. 89
Princeton Ave. plant, Chicago, Dec. 31, 1915	37, 942. 97
Total	1, 720, 884. 47

The basis of said reproductive appraisals was "present current prices, except where otherwise noted, said prices being latest quoted at the date of making this appraisal." In the making of these appraisals no deduction was made for depreciation from the date of acquisition to the date of the appraisal. The reproductive values represent the estimated cost of reproducing the properties new on the respective dates of the appraisals. For the purpose of determining the insurable value of the Princeton Avenue plant of the petitioner, appraised on December 31, 1915, at $37,942.97, the appraisers determined depreciation amounting to $9,752.67, leaving the
149 insurable value $28,190.30. The main plant had been built for
a period of about 22 years and depreciation was computed at the rate of approximately 1 per cent per annum.

The aggregate book value of petitioner's depreciable assets at December 31, 1912, was as follows:

Buildings	$720, 513. 65
Machinery, plant, and loose equipment	685, 385. 53
Montreal property	200. 00
Automobiles	3, 345. 00
Patterns	43, 665. 09
Office furniture	12, 821. 35
Total	1, 465, 830. 62
Less depreciation reserve	268, 169. 32
Balance	1, 197, 761. 30

The exact amounts as of December 31, 1916, on which depreciation was allowed by the respondent were as follows:

Buildings	$547, 824. 17
Power	355, 054. 06
Machinery and tools	416, 330. 49
Automobiles	8, 235. 79
Patterns	56, 589. 60
Total	1, 384, 034. 11

Additions and deductions from depreciable assets between 1913 and 1916 were as follows:

Additions:	
1913	$64, 512. 30
1914	246, 223. 68
1915	15, 399. 77
1916	59, 300. 30
Total additions	385, 436. 05
Deductions resulting from fire in the Franklin plant in 1913	131, 276. 34
Net additions	254, 159. 71

150 The net additions of $254,159.71 subtracted from respondent's value on December 31, 1916, leaves $1,129,884.40 as the respondent's basic value of depreciable assets on March 1, 1913.

The wholesale prices of metals and metal products and building materials in 1907, 1908, and 1912, upon which dates appraisals of petitioner's properties were made by the American Appraisal Co., and the resultant values thereof placed upon the petitioner's books of account, were approximately the same or above such prices in 1913. The prices of the same products and materials in 1915 were also substantially the same as such prices in 1907, 1908, 1912, and 1913.

The petitioner's shares of stock were listed on the St. Louis Stock Exchange. The records of the exchange show that the stock was sold in 1913 at approximately $85 per share. The book value of the stock at December 31, 1912, after the inclusion in assets of $773,041.69 for good will and patents, was $128.79 per share. Prior to 1916 the shares of stock never sold above $91 per share, and in 1910 and again in 1915 sold as low as $75 per share.

The net profits realized by the petitioner from 1908 to 1913 were as follows:

1908	$19,241.91
1909	193,462.27
1910	295,214.02
1911	108,165.60
1912	312,751.42
Total	928,835.22
Average	185,767.04
1913	404,717.11

Net earnings for subsequent years were:

1914	$88,335.38
1915	216,058.12
1916	628,626.68
1917	812,111.75
1918	622,793.12
1919	843,983.11
1920	991,752.84

The Jersey City plant owned by the petitioner was sold in that year
for $54,845. The appraised value of that plant was $79,580.75.
151 Expenses incident to that sale were $6,069.38. Machinery to
the extent of $6,341 was not included in the sale. If the depreciation applied through 1909, 1910, 1911, and 1912 by the petitioner, approximately 2 per cent on buildings and 6 per cent on machinery, were to be applied to these assets, the total depreciation was $8,375.78. The computation showing the difference between the appraised value and the price realized is as follows:

Appraised value at time of sale	$79,580.75
Less machinery removed	6,341.00
Remaining appraised value	73,239.75
Less depreciation	8,375.78
Appraised value of property sold	64,863.97
Price realized	54,845.00
Difference	10,018.97

The price realized on the sale of this property a short time prior to March 1, 1913, was 15.4 per cent less than the appraised value.

In **May**, 1913, the Franklin, Pa., plant of the petitioner was about 75 per cent destroyed by fire. The book value of the property destroyed, which was the same as the appraisal value, was $179,599.48. The depreciation on this property was $24,315.74, leaving a net appraisal value of $155,283.74. The book value of the items salvaged was $40,990, leaving the appraisal or book value of the property destroyed $114,293.74. The insurance received from a settlement with the fire-insurance companies was $111,342.27. This amount was practically 3 per cent less than the appraisal value shown by the petitioner's books of account.

The fair market value of the petitioner's depreciable assets at March 1, 1913, was as follows:

Buildings	$608, 498. 24
Machinery, plant, and loose equipment	461, 354. 72
Montreal property	200. 00
Automobiles	3, 345. 00
Patterns	43, 665. 09
Office furniture	12, 821. 35
Total	1, 129, 884. 40

152 The respondent used a December 31, 1916, value of depreciable assets referred to as "power" of $355,054.06 as a corresponding value for "machinery and tools" of $416,320.49. The book value of these two classes of assets on December 31, 1912, was $685,385.53 less $186,964.28 depreciation accrued thereon, or a net amount of $498,421.25. The power plant is depreciable at the rate of 5 per cent per annum and the machinery and tools at 10 per cent per annum.

The classifications of assets shown by the Coats & Burchard Co. appraisals covering all properties are as follows:

Building materials	$732, 078. 79
Electric lighting systems	15, 624. 69
Pipe and fittings—steam	28, 089. 41
" " " —water	22, 006. 50
" " " —plumbing and sewerage	14, 274. 10
" " " —steam mechanical	23, 983. 80
" " " —air	4, 533. 70
" " " —gas	1, 234. 31
" " " —paint	433. 13
" " " —exhaust and blower	6, 298. 73
" " " —lubricating oil	444. 11
" " " —fuel oil	183. 11
Electric power circuit	11, 102. 81
Benches, etc.	6, 594. 41
Machinery	375, 072. 02
Machinery not in use	17, 956. 57
Shafting	1, 202. 69
Pulleys	3, 574. 70
Belting	13, 219. 32
Tools and miscellaneous equipment	34, 613. 39
Rolls (Franklin plant)	54, 385. 00
Cranes and hoists	35, 870. 95
Furnaces and forges	130, 551. 21
Railroad tracks inside and outside plants	31, 905. 26

Trucks, barrows, and scales	$25,839.90
Office and factory furniture	25,216.82
Foundry equipment	18,233.78
Core room equipment	10,411.42
Flasks	35,092.05
Miscellaneous	40,857.79
	1,720,884.47

153 These figures represent the estimated cost of reproducing in a new condition the depreciable assets on hand at the dates of the appraisals in 1915 and 1916. The cost of net additions to these classes of depreciable assets during the years 1913, 1914, and 1915 was $194,859.41 which amount deducted from $1,720,884.47 leaves $1,526,025.06 as the estimated cost of reproducing in a new condition the depreciable assets on hand December 31, 1912.

Petitioner's income-tax return for 1917 was filed on March 28, 1918; that for 1918 on June 16, 1919; and that for 1919 on March 15, 1920. The deficiency notice for the years 1917, 1918, and 1919 was mailed to the petitioner on March 14, 1925, and petitioner's appeal was filed with this board on May 6, 1925. On December 7, 1925, the Solicitor of Internal Revenue sent the petitioner a letter requesting the execution of a waiver on the form enclosed reading as follows:

> It appears from the records of this office that you have filed an appeal with the United States Board of Tax Appeals, protesting the assessment of additional taxes for the years 1917, 1918, and 1919, and as it is impossible at this time to determine whether the case will be disposed of by the board prior to the expiration of the period of your waiver, you are requested to execute in duplicate and to return to this office at once the enclosed waiver forms.
>
> If the waiver forms are not executed and returned to this office immediately, the commissioner may find it necessary to make assessment of the proposed deficiency under the provisions of section 274 (d) of the revenue act of 1924. If such action be necessary the collection of the amount of the assessment, or so much thereof as may be in controversy, might thereafter be stayed, pending final determination of your appeal by the board, upon the filing of a claim for abatement, accompanied by a bond, pursuant to the provisions of section 279 (a) of the revenue act of 1924.
>
> In replying to this letter please refer to SOL: A.

Upon receipt of this letter the petitioner executed and forwarded to the commissioner an "Income and profits tax waiver for the taxable years ended prior to January 1, 1922," dated December 10, 1925, and reading as follows:

> CHICAGO, *December 10, 1925.*
>
> In pursuance of the provisions of existing internal revenue laws,
> Chicago Railway Equipment Co., a taxpayer of 1928 West
> 154 46th Street, Chicago, Ill., and the Commissioner of Internal
> Revenue hereby waive the time prescribed by law for making
> any assessment of the amount of income, excess-profits, or war-

profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917, 1918, and 1919 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said board.

CHICAGO RAILWAY EQUIPMENT CO.
(Signed) E. T. WALKER, *Secretary*.

This consent was duly executed by the petitioner under its corporate seal and was accepted by the commissioner, his signature being duly affixed thereto. No subsequent consent or waiver was filed by the petitioner and no notice of any deficiency for the years 1917, 1918, and 1919, or any of such years, has since the tenth day of December, 1925, been sent to the petitioner.

Opinion

SMITH: Some of the issues originally raised by the petitioner have been settled by the decision of the Board reported in 4 B. T. A. 452, and by the decision of the United States Circuit Court of Appeals for the Seventh Circuit in Chicago Railway Equipment Co. v. Blair, 20 F. (2d) 10, A. F. T. R. 6817. The order of the board, entered November 4, 1926, and amended November 10, 1926, was reversed by the Circuit Court of Appeals and remanded to this board "with direction to take further evidence, if necessary, on any question, and to fix the market value as of March 1, 1913, and further, to base the depreciation thereon in accordance herewith, and to allow the charge-off of bad accounts for the year 1918." One of the questions originally raised was the proper allowances for depreciation deductible from gross income in the petitioner's tax returns for 1917, 1918, and 1919. The rates at which depreciation should 155 be computed have been settled. No question has been raised as to the correctness of the respondent's determination of net additions to depreciable properties for the period subsequent to March 1, 1913. The only issues before the board relating to depreciation are (1) the March 1, 1913, value of depreciable properties of the petitioner, and (2) the proper segregation of depreciable assets into (a) power and (b) machinery and equipment. By a supplemental petition, allowed to be filed by the board in an order entered January 6, 1928, the petitioner alleges that the assessment and collection of any deficiencies for the years 1917, 1918, and 1919 are barred by statutes of limitation.

The board assumes that under the mandate of the Circuit Court of Appeals it has jurisdiction to consider the question raised in the supplemental petition. In Foster Federal Practice, Vol. 4, sixth edition, section 712, it is stated:

> * * * Where a decree is reversed with a procedendo or directions that further proceedings be had in a conformity with, or not inconsistent with the opinion of the appellate court, or a new trial is ordered; the court of first instance has plenary authority to allow amendments, consolidation with another case, and further proof, except in so far as the opinion or mandate specifically forbids. Although the mandate contains no direction for a new trial, it seems that a new trial may be ordered when there is a provision for a procedendo. The mandate must be interpreted according to its subject matter, and the decree of the court below as well as that of the appellate court may be taken into consideration in the interpretation thereof. (Numerous cases cited.)

In Rio Grande Dam and Irrigation Co. v. United States, 215 U. S. 266, it was held that, where a case is opened, further evidence may be produced, it is also open for the amendment of the original pleadings or for additional pleadings appropriate to the issues; and permission by the lower court to file such supplemental complaint is not inconsistent with the mandate of the Supreme Court remanding the case with directions to grant leave to both sides to adduce further evidence. In Hawkins v. Cleveland, C., C. & St. L. Ry Co. (C. C. A. Seventh Circuit), 99 Fed. 322, 324, it was held:

> * * * In the present case the decree below was reversed, but, instead of a direction for the entry of any particular decree, the mandate was, as stated, that further proceedings should be had, not inconsistent with the opinion of this court. The effect was to
> put the case in the same posture as if no decree had ever been
> 156 entered, and in that situation the court had the same authority
> to permit an amendment of the petition or bill of the appellee for the purpose of enlarging the issue and of admitting further proofs as it had before the entry of the reversed decree. The case of In re. Sanford Fork & Tool Co., 160 U. S. 247, 16 Supp. Ct. 291, 40 L. Ed. 414, affords an apt precedent.
>
> Counsel for the appellant have urged that in this instance it would be inequitable to permit a change in the issues, but in the first instance at least, that is a question for the circuit court. * * *

1. The main issue relates to the March 1, 1913, value of petitioner's depreciable properties. The exact amounts as of December 31, 1916, on which depreciation was allowed by the respondent have been set forth in the findings of fact and total $1,384,034.11. Between March 1, 1913, and December 31, 1916, additions had been made to the petitioner's depreciable properties in the net amount of $254,159.71. This amount subtracted from the respondent's value on December 31, 1916, leaves $1,129,884.40 as the respondent's basic

value of depreciable assets on March 1, 1913. The book value of the depreciable assets of the petitioner on December 31, 1912, less the reserve for depreciation chargeable against such book value, was $1.197.761.30. It will thus be seen that the petitioner's book values at March 1, 1913, and the values used by the respondent as a basis for the computation of allowable depreciation for the taxable years were approximately the same. In the former opinion of the board, 4 B. T. A. 452, it was stated that the Commissioner:

> * * * computed the allowance for exhaustion, wear and tear of the buildings, machinery, and equipment upon the basis of undepreciated cost on March 1, 1913, plus the cost of additions since that time, as representing, in the absence of better evidence, the fair market price, or values on March 1, 1913. * * *

The basis for this statement was the deficiency notice sent to the petitioner advising it of deficiencies for the years 1917, 1918, and 1919. Upon the second hearing of this case evidence was adduced to show that the March 1, 1913, values used by the respondent were greatly in excess of the cost of the depreciable properties to the petitioner. The petitioner's plants had been appraised at sundry times prior to March 1, 1913, and the book values theretofore carried at cost had been stepped up to accord with the appraisals. The book values of the petitioner's plants located at Grand Rapids and Detroit, Mich., Marion, Ind., and Jersey City, N. J., were
157 stepped up at the close of 1908 to the extent of $185.797.83 to accord with appraisals of properties which had been made. The petitioner's auditor admitted that these increases in book values increased the book value over cost to the amount stated. An appraisal was made of the Franklin plant in 1912, shortly after its acquisition, and the book value was increased over cost to accord with the appraisal to the extent of $148.244.09. The record shows that the costs of petitioner's plants were accurately reflected by the petitioner's books of account except where they had been increased as a result of appraisals. Depreciation had been charged off in amounts approved by the company's auditors.

The petitioner contends that the March 1, 1913, values of its depreciable assets were $1.536.323 and that they were classified as follows:

Franklin, Pennsylvania, plant:	
Buildings	$78, 489. 00
Power plant	41, 920. 00
Machinery and equipment	251, 956. 00
Total	372, 365. 00
Marion, Indiana, plant:	
Buildings	154, 481. 00
Power plant	3, 225. 00
Machinery and equipment	142, 404. 00
Total	300, 110. 00

Grand Rapids, Michigan, plant:	
Buildings	$139,236.00
Power plant	16,448.00
Machinery and equipment	170,866.00
Total	326,550.00
Chicago plant:	
Buildings	217,364.00
Power plant	15,916.00
Machinery and equipment	147,833.00
Total	381,113.00
Detroit, Michigan, plant:	
Buildings	49,937.00
Power plant	9,857.00
Machinery and equipment	96,391.00
Total	156,185.00

158 This amount is exclusive of patterns and automobiles. These are the values claimed by the president of the petitioner to represent the fair market values.

Although based upon the Coats & Burchard Co. appraisals as of 1915 and 1916, the amounts claimed by the petitioner as the fair market values of depreciable assets on March 1, 1913, are in excess of the estimated cost of reproducing the properties new on March 1, 1913, allowance being made for net additions to depreciable assets during the years 1913, 1914, and 1915. As shown by the findings of fact the cost of reproducing the properties new on December 31, 1912 (based on the Coats & Burchard Co. appraisals) was $1,526,025.06, whereas the petitioner's officers claim that those values were $1,536,323.

That the Coats & Burchard Co. appraisals represent not the fair market values of the petitioner's depreciable assets at the dates of the appraisals but the estimated cost of reproducing the properties in a new condition on those dates, is conclusively proven by the testimony of the petitioner's auditor Forward. Upon the first hearing of this case he was asked:

Q. Is it a fact that the reproductive values which they [Coats & Burchard Co.] found make allowance for depreciation?

A. No, sir; the depreciated values are stated separately.

Q. Have you testified heretofore as to the depreciated values which that company found?

A. I gave yesterday—well, to answer your question directly, no, sir.

Q. All the testimony you have given heretofore relates to retroactive [reproductive] values?

A. Yes, sir; and I gave my own opinion of all of what the depreciation was on those plants on March 1, 1913.

It appears from other testimony of the witness Forward that Coats & Burchard Co. prepared in connection with their reproductive appraisals depreciation schedules which might, if they had been offered in evidence, have afforded a satisfactory basis for determining the fair market values on March 1, 1913. The auditor admitted that such depreciation schedules had been prepared by the Coats & Burchard Co. He testified at the first hearing that he had left the depreciation schedules prepared by the Coats & Burchard Co. "over at the hotel." They have never been offered in evidence. It thus appears that the Coats & Burchard Co. appraisals offered in evidence are incomplete. 159 The portions offered do not purport to give fair market values of assets in their then condition at the dates of the appraisals. Forward estimated that the depreciation which had accrued on brick buildings on March 1, 1913, was, in round numbers, $41,000, on iron and steel buildings, $2,000, on power $11,000; and on equipment $77,000. Nevertheless, in making their estimates of fair market values at the basic date, the petitioner's witnesses took no account of depreciation which had accrued upon the assets.

Manifestly, the great bulk of the petitioner's assets on hand on March 1, 1913, had suffered depreciation. Some of them had been owned for many years and the depreciation claimed to have been sustained upon them during the taxable years runs to large figures. In the light of the fact that depreciation has not been taken into account by the petitioner's witnesses in determining the fair market value on March 1, 1913, we cannot accept the petitioner's estimates of value as reflecting the fair market value. The Coats & Burchard Co. appraisals do not support the contentions of the petitioner.

In the second hearing of this case the evidence as to actual market values on March 1, 1913, covered a broader field and was much more complete than the evidence offered at the first hearing. The board, at this time, in addition to the reproductive appraisals and the general endorsement thereof by corporate officers, now has before it evidence of earnings before and after 1913, of the prices at which shares of stock were sold for a period of years prior to 1916, of reproductive appraisals in existence in 1913, and of a sale of a portion of a plant in 1912. This additional evidence, as shown by the findings of fact, supports the substantial correctness of the determinations of values of the petitioner's assets made by the respondent at the basic date, March 1, 1913.

The book value of depreciable assets at December 31, 1912, was $1,197,761.30. The fair market value used by the respondent for such assets on March 1, 1913, was $1,129,884.40, or a difference of only $67,876.90. Taking into consideration depreciation from January 1 to February 28, 1913, inclusive, and changes in assets owned during the period we find from the evidence that the total of the values used by the respondent as the March 1, 1913, value was not understated. They are therefore sustained. 160 The total value has been segregated into classes of depreciable property in our findings of fact as warranted by the evidence.

2. The second question in issue relating to depreciation is the correct allocation between (a) power and (b) machinery and equipment of the March 1, 1913, values. The witness Forward claims

that only machines generating power such as boilers, engines, pumps, etc., should be classified as power. He testified that the March 1, 1913, value of the power plant was $87,366.59, and of machinery and tools $811,040.84. At the second hearing of this case he picked out from the Coats & Burchard Co. appraisals of 1915 and 1916 items in the machinery account totaling $105,752.42 which he regarded as properly belonging to the power plant. All of the balance of the depreciable assets other than buildings, patterns, and automobiles he classified as machinery and equipment subject to a 10 per cent depreciation rate. It is the contention of the respondent that not only the machines generating the power, but also that the apparatus or equipment for the transmission of power should also be classed as power and depreciated at a 5 per cent rate.

The Coats & Burchard Co. appraisals made in 1915 and 1916 show no classification of assets under power. The classifications used are in great detail as shown by the findings of fact. No evidence has been adduced as to the rates of depreciation properly ascribable to the various classes of assets.

Whether the category "power" should carry anything more than boilers, engines, pumps, etc., it is impossible for us to determine from the evidence. We are satisfied, however, that there are many items of assets which are not properly to be classed as machinery. We think that the various classifications of pipe and fittings, valued in excess of $118,000 by Coats & Burchard Co., are not properly to be considered as in the same category as machinery, and we are of the opinion that they should not be depreciated at the 10 per cent rate. The 5 per cent rate applied to power should in our opinion cover items connected with the transmission of power. We think that the same holds true with respect to railroad tracks valued at $31,000, cranes and hoists at $35,000, furnaces and forges at $130,000, and numerous other classes of assets. If some or all of these items are not properly to be regarded as power we think it is equally plain
that they are not properly to be regarded as machinery. The
161 only purpose of the classification of assets as "power" and
"machinery and equipment" is to determine a basis for determining the assets depreciable at a 5 per cent rate and at a 10 per cent rate. The evidence in our opinion proves the substantial correctness of the respondent's allocation.

3. The final point is whether the assessment and collection of deficiencies determined for the years 1917, 1918, and 1919 are barred by statutes of limitations.

It is submitted on behalf of the petitioner that at the time of the filing of the consent dated December 10, 1925, the power of the respondent to assess any deficiency taxes for the years 1917, 1918, and 1919 had expired and that it was only by virtue of a consent that any right to make future assessment can be exercised; that petitioner is bound only by the terms of the waiver so filed, which is that the petitioner consents to the extension of the statute of limitations until the 31st day of December, 1926, and no longer, unless in the meantime a notice of a deficiency tax is sent to the petitioner by registered mail, and then if no appeal is taken the time for the making of this assessment shall be extended 60 days, or, if an appeal is filed, then the date shall be extended by the number of days between the date of mailing of the notice of deficiency and the date of the final decision of the board; that no such deficiency letter was mailed after the filing of the consent and that therefore the sole effect of the consent filed was to extend the time for the making of these assessments until December 31, 1926, and no further; that prior to the act of 1926 the statute of limitations was solely a statute of repose; that it in no manner affected the obligation; that in the act of 1926 it is provided by section 1106 that the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability. The petitioner therefore contends that since December 31, 1926, no power has existed in the commissioner to assess any deficiency tax against the petitioner for any of the years 1917, 1918, and 1919.

If the petitioner had filed no consent for the assessment of the deficiencies for the years 1917, 1918, and 1919 the right of the commissioner to make such assessments would have been barred so far as the year 1917 is concerned on March 29, 1923; for 1918 on July 17,
1924; and for 1919 on May 16, 1925. The deficiency notice was
mailed to the petitioner on March 14, 1925, and the petitioner's
162 appeal was filed with this board on May 6, 1925. Clearly,
under the provisions of section 277 (b) of the revenue act of
1924, the assessment of any deficiency for the year 1919 is not barred from assessment and collection, since the commissioner notified the petitioner of a deficiency in tax for 1919 within the five-year period of limitation provided by the act, and the appeal was taken to this board within such period.

It is to be noted, however, that, where a consent for a later determination of assessment is filed by the petitioner with the commissioner, the assessment may be made within the period as extended by such consent. The letter of the commissioner sent to the petitioner on December 7, 1925, over the signature of the solicitor, states that, "as it is impossible at this time to determine whether the case will be disposed of by the board prior to the expiration of the period of your waiver," a further consent is requested. The necessary implication from this letter is that the commissioner was in possession of consents extending the period within which assessments might be made for the years 1917, 1918, and 1919. No witness for the petitioner testified that no such consents had been given and the necessary inference is that such consents had been given. Furthermore, the prompt action of the petitioner in filing a consent under date of December 10, 1925, for the determination of deficiencies for 1917, 1918, and 1919 would imply that such consent had been given. The fact that no such prior consent was offered in evidence by the respondent does not prove that no such timely consent or consents had been given.

But, even if no such consents had been given with respect to deficiencies for the years 1917 and 1918, we are still of the opinion that the consent filed under date of December 10, 1925, is a substantial compliance with the statute giving the commissioner until December 31, 1926, within which to determine deficiencies for the years 1917, 1918, and 1919. Joy Floral Co., 7 B. T. A. 800. It is true that the consent of December 10, 1925, states:

> This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date * * *

and it was stipulated at the hearing that no notice of deficiency for the years 1917, 1918, and 1919, or any of such 163 years, was sent to the petitioner subsequent to December 10, 1925. But a notice of deficiency had been sent to the petitioner on March 14, 1925, and we think, therefore, that the petitioner is bound by the consent filed. A second notice of deficiency after the filing of the consent was unnecessary. We therefore are of the opinion that the assessment and collection of any deficiencies due for the years 1917, 1918, and 1919 are not barred by statutes of limitation.

The deficiencies determined for the years 1917, 1918, and 1919 will be determined in accordance with the decision of the Circuit Court of Appeals, Seventh Circuit, above referred to, and in accordance with this opinion. The value of the steel and iron buildings of the petitioner should be depreciated at the rate of 5 per cent per annum from March 1, 1913, in accordance with the decision of the Circuit Court of Appeals.

Reviewed by the board.

Judgment will be entered under rule 50.

Now, July 23, 1929, the foregoing findings of fact and opinion certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Order of Redetermination

February 21, 1929

Pursuant to the findings of fact and opinion promulgated by the board in the above-entitled proceeding on September 24, 1928, the respondent on January 14, 1929, filed a notice of settlement showing overassessments for the years 1917 and 1918 in the amounts of $799.43 and $36,455.15, respectively, but deficiencies in payment for

the same years in the amounts of $20,916.37 and $50,974.12, respectively, and deficiencies in assessment and payment for the years 1919, 1920, and 1921 of $8,297.64, $18,817.76, and $2,381.74, respectively. On February 9, 1929, the petitioner filed objections to the settlement proposed by the respondent, together with a recomputation of
164 tax by the taxpayer. Hearing was had upon the contested settlement on February 13, 1929. After consideration thereof, it is hereby

Ordered and decided that upon redetermination there are found to be deficiencies in payment of taxes and interest assessed for 1917 and 1918 of $20,916.37 and $50,974.12, respectively, and deficiencies in assessment and payment for 1919, 1920, and 1921 of $8,297.64, $18,817.76, and $2,381.74, respectively.

(Signed) Charles P. Smith,
Member United States Board of Tax Appeals.

Washington, D. C.

Now, July 23, 1929, the foregoing order of redetermination certified from the record as a true copy.

Entered Feb. 21, 1929.

[SEAL.]

B. D. Gamble,
Clerk U. S. Board of Tax Appeals.

A true copy, teste.

B. D. Gamble,
Clerk U. S. Board of Tax Appeals.

CPS:aa

165 In United States Circuit Court of Appeals for the Seventh Circuit

No. 3964

Chicago Railway Equipment Company, a Corporation, petitioner

vs.

David H. Blair, Commissioner of Internal Revenue, respondent

Petition for review

Filed May 8, 1929

Comes now the Chicago Railway Equipment Company, a corporation, by William S. Oppenheim and Henry W. Price, its attorneys, and respectfully shows unto this court:

A

1. That it is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois.

2. That the petitioner filed its income-tax return in the office of the collector of Internal Revenue at Chicago for the year 1917 on March 28, 1918; its return for the year 1918 on June 16, 1919; and its return for the year 1919 on May 15, 1920.

3. That the Commissioner of Internal Revenue thereafter, on March 14, 1925, upon an audit of said several income-tax returns, determined that additional taxes should be assessed against the petitioner; that there should be assessed for the year 1917 an additional tax of twenty-two thousand three hundred thirty-seven dollars and eighty-five cents ($22,337.85); for the year 1918 the sum of eighty-five thousand eight hundred fifteen dollars and fifty-five cents ($85,815.55), and for 1919 the sum of fifteen thousand six hundred nine dollars and ninety-one cents ($15,609.91).

4. That the petitioner in its returns for each of said years
166 claimed a depreciation deduction of one hundred fifty thousand ($150,000,000) dollars, which the Commissioner of Internal Revenue refused to allow for the full amount. The commissioner deducted the sum of four hundred ninety-nine thousand one hundred seventy-six dollars and twenty-one cents ($499,176.21) appreciation which petitioner had added to the value of its depreciable property. Said sum represented the difference between what petitioner had paid for three several bankrupt properties at Marion, Indiana, Grand Rapids, Michigan, and Franklin, Pennsylvania, and the depreciable value of such properties when rehabilitated and put into profitable operation by petitioner.

5. The Commissioner of Internal Revenue also rejected a deduction of forty thousand one hundred one dollars and sixty-seven cents ($40,501.67) of bad debts made in the year 1918.

6. That the petitioner appealed from such determination of said commissioner to the United States Board of Tax Appeals, which, upon the 28th day of July, 1926, promulgated its finding of facts and opinion and found that the commissioner was in error in refusing to allow a deduction to petitioner of bad debts amounting to thirty-three thousand two hundred seventeen dollars and seventeen cents ($33,217.17), but further found that such bad debts should be deducted from the income of petitioner for the year 1919, instead of the year 1918, as claimed by petitioner, and said board, on the 4th day of November, 1926, pursuant to said finding of facts and opinion, ordered and decided that there is a deficiency in the income tax of petitioner of twenty-two thousand three hundred thirty-seven dollars and eighty-five cents ($22,337.85) for 1917, eighty-five thousand eight hundred nineteen dollars and fifty-nine cents ($85,819.59) for 1918, and six thousand three hundred nine dollars and sixteen cents ($6,309.16) for 1919.

7. That the petitioner appealed from the said decision of the United States Circuit Court of Appeals for the Seventh Circuit and said decision was therein reversed, with directions to said board to allow the charging off of said bad debts in the year 1918 instead of 1919 and also to take further evidence, if necessary, on any question

to fix the market value as of March 1, 1913, and further to base the depreciation thereon in accordance with the opinion of said court. It was stated in said opinion:

> "These properties were a part of a going concern and
> 167 were adapted to the purpose for which they were used. We
> are of the opinion that the board could not disregard the obvious and say it had before it no evidence of March 1, 1913, values and that the board erred in rejecting the evidence before it of the market value."

8. That upon remandment of said cause to the board for a further hearing, petitioner, upon leave granted, filed its supplemental petition on January 10, 1928, claiming that the assessment and collection of any deficiency for the years 1917 and 1918 and 1919 were barred by the statute of limitations.

9. A trial was had before the board on March 22, 1928, and additional evidence was introduced by petitioner of the market value of its property on March 1, 1913, and the income derived therefrom by petitioner, and on September 24, 1928, the board promulgated its finding of facts and opinion that the depreciated value of the property on March 1, 1913, was the same as that found by the respondent, who had rejected an appreciation of four hundred ninety-nine thousand one hundred seventy-six dollars and twenty-one cents ($499,176.21) placed by the petitioner on its books as the difference between what the bankrupt plants had cost petitioner and their value after rehabilitation and profitable use. The board also held that the written waiver of petitioner, signed December 10, 1925, consenting that the time for making any assessment for the years 1917, 1918, and 1919 should remain in effect until December 31, 1926, waived the bar of the statute of limitations and said board on the 21st day of February, 1919, pursuant to said finding of facts and opinion, ordered and decided that there is a deficiency in the income taxes of petitioner of twenty thousand, nine hundred sixteen dollars and thirty-seven cents ($20,916.37) for the year 1917, fifty thousand nine hundred seventy-four dollars and twelve cents ($50,974.12) for the year 1918, and eight thousand two hundred ninety-seven dollars and sixty-four cents ($8,297.64) for the year 1919.

10. The court in which review is sought is the United States Circuit Court of Appeals for the Seventh Circuit.

11. This petitioner claims that the statement of the board in its first opinion that the commissioner computed the depreciation upon the basis of undepreciated cost on March 1, 1913, plus costs of additions since that time, as the fair, market value of petitioner's
property was correct and the statement in its present opinion
168 that "Upon the second hearing in this case evidence was
adduced to show that the March 1, 1913 values used by the respondent were greatly in excess of the cost of the depreciable properties to the petitioner" is without the slightest foundation, and that no such evidence was introduced or suggested upon the second

hearing. That the evidence is uncontroverted that the petitioner claimed an appreciation of its properties, bought at bankrupt prices, in the amount of four hundred ninety-nine thousand one-hundred seventy-six dollars and twenty-one cents ($499,176.21) in excess of its original cost to the petitioner, after these properties had been rehabilitated and put in profitable use; that the whole of this appreciation was eliminated by the commissioner as shown by his deficiency letter of March 14, 1925. That the controversy between the commissioner and the petitioner in regard to depreciation arises wholly out of the rejection of this appreciation, the petitioner insisting that it is entitled to a depreciation upon the reproductive or book values of the properties which represent the original cost of construction, or if a depreciated value is to be taken of the bankrupt properties so purchased then the percentage rate of depreciation must be increased in accordance with the rules promulgated by the Treasury Department, the "Depreciation studies of the department" stating "A new asset with ten years' useful life will have a ten per cent rate of depreciation, but if that asset is sold after five years' use, the buyer has an expectancy of but five more years of usefulness from the asset, and requires a twenty per cent rate of depreciation."

12. It is further contended by the petitioner that the board erred in confirming the segregation made by the commissioner of the "power" and "machinery and equipment," wherein it is claimed by the petitioner that the commissioner transferred from "Machinery and equipment" a large amount of property into "power" ("Power" having a five percent depreciation and "Machinery and equipment" a ten per cent depreciation), thereby reducing the amount of depreciation which should have been allowed to petitioner.

13. Briefly the controversy, outside of the segregation into "Power" and "Machinery and equipment" as above, is that if the reproductive or book values of the property as of March 1, 1913 are not used and the depreciated value of the bankrupt plants purchased by the petitioner are used, then the rate of depreciation upon
169 the depreciated plants must be increased to the extent of allowing the same depreciation upon the depreciated values as would be allowed had the property not been depreciated.

14. It is further contended by the petitioner that the alleged taxes for the years 1917 and 1918 are barred from assessment and collection by the statute of limitations. Petitioner's return for the year 1917 was filed on March 28, 1918, and its return for the year 1918 on June 16, 1919. The five years' statute of limitations woud bar the assessment and collection of these alleged taxes on March 28, 1923, for the year 1917, and on June 16, 1924, for the 1918 taxes.

The appeal in this case was filed on May 6, 1925, at which time the taxes for 1917 and 1918 had been barred. During the pendency of this appeal, on December 7, 1925, the commissioner secured from the petitioner a waiver of the assessment of these taxes, which was to expire on December 31, 1926. Under the revenue act of 1926, the statute destroyed all liability upon taxes which had been then barred. The waiver having been executed after the statute had barred the assessment of these taxes was without consideration and it was not within the power of the commissioner or the petitioner to revive an obligation which was ended. In addition, even if the waiver was not invalid by its terms, the assessment must be made on or prior to December 31, 1926, and that time having elapsed, the waiver is of no effect and an assessment can not be made under the order of the Board of Tax Appeals after such date.

B

This petitioner hereby assigns the following errors in respect to the decision of the said Board of Tax Appeals:

1. That said board erred in not allowing the petitioner the sum of one hundred fifty thousand ($150,000) dollars per year for each of the years of 1917, 1918, and 1919 as depreciation and deducting such sum from the gross income of the petitioner for each of said years.

2. Said board erred in not fixing the market value of petitioner's depreciable property as of December 31, 1917, as follows:

Value of brick buildings	$629,455.41
Value of steel and iron buildings	144,426.44
Value of power plant	115,376.71
Value of machinery and equipment	994,036.82

170 and allowing a depreciation rate of three per cent on the value of such brick buildings, five per cent on the value of such steel and iron buildings and power plant, and ten per cent on the value of such machinery and equipment.

3. Said board erred in not increasing the rate of percentage of depreciation upon the depreciated value of petitioner's property.

4. Said board erred in holding that the alleged additional taxes for the years 1917 and 1918 are not barred from assessment and collection by the statute of limitations.

C

Wherefore this petitioner respectfully prays that the said decision and order of the Board of Tax Appeals may be reviewed by the United States Circuit Court of Appeals for the Seventh Circuit and that the said decision and order of the Board of Tax Appeals be reversed with a finding that no additional tax should be assessed and collected against the petitioner for any of the years 1917, 1918, and 1919.

D

The petitioner further requests that within sixty days from the filing of the petition for review and the service of a copy thereof, with notice of filing the same on the Commissioner of Internal Revenue, the board will prepare and file with the court above named and cause its clerk to transmit and deliver to the clerk of said Circuit Court of Appeals, and duly certified as correct, copies of the following documents:

1. Docket entries of proceedings before the board.
2. Pleadings before the board.
3. Finding of facts, opinion, and decision of the board.
4. Petition for review.
5. Statement of the evidence.

WILLIAM S. OPPENHEIM,
HENRY W. PRICE,
Counsel for Petitioner,
904 First National Bank Building, Chicago, Illinois.

171 [*Duly sworn to by Edward T. Walker; jurat omitted in printing.*]

Before U. S. Board of Tax Appeals

Notice of petition for review

To Commissioner of Internal Revenue, Washington, D. C.

You are hereby notified that the Chicago Railway Equipment Company has filed in the office of the clerk of the United States Board of Tax Appeals its petition for review by the United States Circuit Court of Appeals for the Seventh Circuit of the decision of the United States Board of Tax Appeals in the matter of the appeal of the Chicago Railway Equipment Company, petitioner, v. the Commissioner of Internal Revenue, respondent, Docket No. 3964, a copy of which petition is hereto attached.

WILLIAM S. OPPENHEIM,
HENRY W. PRICE,
Counsel for Chicago Railway Equipment Company, Petitioner.

Received a copy of the foregoing notice and a copy of said petition this 6th day of May, A. D. 1929.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Now, July 23, 1929, the foregoing petition for review and praecipe with notice of filing and proof of service certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

172

Before U. S. Board of Tax Appeals

Order enlarging time

For cause appearing of record, it is

Ordered that the time for filing certified copies of record papers sur petition for review of the above-entitled proceedings in the

United States Circuit Court of Appeals for the Seventh Circuit be, and it is hereby, continued to August 6, 1929.

(Signed) BENJAMIN H. LITTLETON,
Member, United States Board of Tax Appeals.

Dated Washington, D. C., July 6, 1929.

B. D. GAMBLE, *Clk.*

A true copy: Teste.
[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

173 [Clerk's certificate to foregoing transcript omitted in printing.]

174 [Appearances of counsel omitted in printing.]

175 In United States Circuit Court of Appeals for the Seventh Circuit

CHICAGO RAILWAY EQUIPMENT COMPANY, petitioner
vs.
COMMISSIONER OF INTERNAL REVENUE, respondent

B. T. A. Docket No. 3964.
Court of Appeals, Docket No. 4225.

Stipulation re substitution

Filed Nov. 14, 1929

It is hereby stipulated and agreed by and between the petitioner in the above-entitled cause and Robert H. Lucas, as Commissioner of Internal Revenue, through their respective attorneys, as follows:

That since the filing of the petition for review in the above-entitled cause, David H. Blair, who was at that time Commissioner of Internal Revenue, and who was the respondent at that time in the above-entitled cause, and had been Commissioner of Internal Revenue since the appeal was originally filed in the United States Board of Tax Appeals at Washington, D. C., has resigned as said Commissioner of Internal Revenue, and his resignation has been duly accepted.

That David H. Blair ceased to be Commissioner of Internal Revenue on the 31st day of May, 1929.

That Robert H. Lucas was duly appointed as Commissioner of Internal Revenue to succeed the said David H. Blair, and has duly qualified as said Commissioner of Internal Revenue.

That on June 1, 1929, said Robert H. Lucas became Commissioner of Internal Revenue, and ever since that time has been, and now is, Commissioner of Internal Revenue.

It is further stipulated and agreed between the petitioner in the above-entitled cause and Robert H. Lucas, as Commissioner of Internal Revenue, through their respective attorneys, that agree-176 ably to this court, and in accordance with the law, this cause may be revived so that this action will be pending against the said Robert H. Lucas, as Commissioner of Internal Revenue, and that said Robert H. Lucas, as Commissioner of Internal Revenue, may be substituted as the respondent in this cause for the said David H. Blair, formerly Commissioner of Internal Revenue.

That there is substantial need for so continuing and maintaining this cause because if it is not so continued and maintained the order of the United States Board of Tax Appeals, for the review of which the petition for review in this cause was filed, will become final; the tax found by the said Board of Tax Appeals to be due will be assessed and collected from this petitioner without recourse to further contest its legality or to obtain a refund thereof.

It is further stipulated and agreed by and between the petitioner in the above-entitled cause and Robert H. Lucas, as Commissioner of Internal Revenue, through their respective attorneys, that the service of notice of the motion to revive this action in the name of Robert H. Lucas, as Commissioner of Internal Revenue, and to have his name substituted as respondent in this cause, is hereby waived, and the said Robert H. Lucas, as Commissioner of Internal Revenue, by and through his attorney, consents that an order may be made forthwith by the court reviving this cause in the name of Robert H. Lucas, as Commissioner of Internal Revenue, and substituting him as respondent in this cause for the former Commissioner of Internal Revenue, David H. Blair.

WILLIAM S. OPPENHEIM,
HENRY W. PRICE,
Attorneys for Petitioner.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, Attorney for Robert H. Lucas, as Commissioner of Internal Revenue.

[File endorsement omitted.]

177 In United States Circuit Court of Appeals

[Title omitted.]

Order substituting party respondent

Nov. 14, 1929

It is now here ordered that the stipulation of counsel filed this day relating to substitution of party respondent in this cause be, and the same is hereby approved, and that this cause be revived, and that Robert H. Lucas, Commissioner of Internal Revenue, be substituted as respondent in this cause for former Commissioner of Internal Revenue David H. Blair.

It is further ordered that the title of this cause shall remain Chicago Railway Equipment Company, petitioner, *vs.* Commissioner of Internal Revenue, respondent.

In United States Circuit Court of Appeals

[Title omitted.]

Order extending time

Dec. 28, 1929

It is now here ordered that the time for filing brief for respondent in this cause be, and the same is hereby, extended to January 4, 1930.

178 It is further ordered that this cause be placed on the calendar of the January session of the October term, 1929, and set down for hearing on January 14, 1930.

[Appearance of counsel omitted in printing.]

[Minute entry of argument and submission Jan. 14, 1930, omitted in printing.]

179 In United States Circuit Court of Appeals for the Seventh Circuit

Nos. 4225 and 4226

October Term, 1929, January Session, 1930

Petitions for review of order of United States Board of Tax Appeals

CHICAGO RAILWAY EQUIPMENT COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Opinion

Filed March 27, 1930

Before Alschuler, Page, and Sparks, Circuit Judges.

Opinion by Page, Cir. J.

No. 4225. In 20 Fed. (2d) 10, where most of the facts appear, we reversed the order of the Board of Tax Appeals (4 B. T. A. 452), which sustained assessments of additional taxes for the years 1917, 1918, and 1919.

On the second hearing, the statute of limitations was pleaded, new evidence was taken, an order sustaining the assessments entered and petitioner again asks for a reversal.

That the assessments for the years 1917 and 1918 were made after the statute had run, unless saved by waivers, is admitted. Petitioner admitted a waiver on December 10, 1925, long after the statute had run.

The board has held that the burden is upon the commissioner to
prove a waiver (Bonwitt Teller & Co. v. Commissioner, 10 B. T. A.
1336; Farmers Feed Co. v. Commissioner, 10 B. T. A. 1069;
180 Stevens v. Commissioner, 14 B. T. A. 1120). Respondent
offered no evidence of a waiver. The evidence shows the
waiver of December 10, 1925, and two letters written to petitioner
by the Revenue Department, both after the statute as to the 1917
and 1918 taxes had run, stating that waivers had been filed.

The board held the assessments legal on the theory that: (a) the statements in the letters were evidence that waivers had been made; (b) a waiver at any time is a sufficient basis for an assessment.

We are of opinion that the letters were not even evidence that waivers had been made, and certainly they were no evidence of the time when they were made, or when they expired, or of any other fact. Such waivers were so obviously a part of respondent's case that the only inference to be drawn from his failure to produce them is that they did not exist.

It is urged, on authority of Insley Mfg. Co. v. Thurman, 33 Fed. (2d) 44, decided by this court, that a waiver, after the statute has run, is good. While in that case there was such a waiver, it was made while a former waiver, made before the statute had run, was still in force. The question here was not there decided, nor was it before us.

In Pictorial Printing Co. v. Commissioner, decided February 28, 1930, (— Fed. (2d) —), we had before us the question as to whether a waiver, made at a time when the commissioner had no authority to assess the tax in question and the taxpayer was under no obligation to pay it, had any force. We there held that no valid waiver was shown, and we here hold that the statute had run as to the 1917 and 1918 assessments. No such error is assigned as to the 1919 assessment.

It is urged that the board erred in fixing the March 1, 1913, fair market value of petitioner's properties, consisting of large factory buildings and equipment, located in five States.

The plants were bought between 1892 and 1912, from older concerns, some of them from receivers or trustees, and at prices much below the original cost. From time to time large sums of money were spent upon the properties for buildings, renewals, and repairs.

Appraisals prior to 1913 showed a property value of $334,244.09 greater than the cost of the properties to petitioner, and the book values were increased by that sum.

Respondent, apparently ignoring the question of March 1,
1913, fair market value, proceeded to find the cost of the
181 properties on December 31, 1916. The parties undertook
before the board to establish the March 1, 1913, market value.

The evidence before the board shows several sets of figures bearing upon values.

(1) It is admitted that the cost of the properties as of Dec. 31, 1916, was	$1,384,034.11
There was expended on the properties between Jan.[1] 1, 1913, and Dec. 31, 1916	385,441.05
So that the cost Mar. 1, 1913, was	998,593.06
If we add the amount put on the books because of the appraisals prior to 1913 and above referred to	334,244.09
We have, as the Mar. 1, 1913, undepreciated value, as shown by those figures	1,332,837.15

Four of the appraisals prior to 1913 were made as early as 1908 and the last one in 1912. The above figures aid but little in finding the March 1, 1913, market value.

(2) Coats & Burchard, between Nov. 27, 1915, and Feb. 1, 1916, appraised all of petitioner's properties. Those appraisal books are not before us, but the appraisals purport to show the reproduction cost, new, of all properties at that time; such cost was	$1,720,884.47
By deducting additions for 1913, 1914, and 1915 amounting to	326,130.75
We have the Mar. 1, 1913, reproduction value as	1,394,753.72
Forward testified he thought Coats & Burchard depreciation figures were	262,000.00
So that on those figures the Mar. 1, 1913, depreciated value was	1,132,753.72

(3) Petitioner's president, Leigh, testified that he knew the fair cash market value of the properties Mar. 1, 1913, and stated that it was $1,536,323. Forward testified that the properties on that date were worth $1,584,926.13—some $48,000 higher than Leigh.
182 If Leigh gave the details of his figures we have not been able to identify them. He did, however, give what he said were figures in the Coats & Burchard appraisals, showing a total of $1,782,939.00. He testified that those figures represented the fair reproduction value of those properties at that time. If we deduct the additions in 1913, 1914, and 1915—$326,130.75—there remains as of Mar. 1, 1913, $1,456,808.25, as Leigh's idea of the Coats & Burchard 1913 reproduction value. That was nearly $100,000 less than Leigh testified was the Mar. 1, 1913, fair cash market value. Leigh had not appraised the properties. His testimony, above referred to, may be explained by his testimony elsewhere—that he did not think there was much difference between the fair market value and the reproduction value. He also said his figures were identical with Coats & Burchard's. Forward's situation is much the same as Leigh's. He testified:

"I have not made any independent appraisal of any property other than on certain items in the plant."

He took his figures from the books and appraisals made by others.

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[1] In cases where we have made deductions of expenditures on the properties made after Jan. 1, 1913, we have deducted the whole of the 1913 expenditures, because expenditures, if any, for the months of January and February, 1913, do not separately appear.

(4) The record shows various balance sheets, beginning in 1908, that purport to show gross reproduction values. Depreciation reserves are there stated in gross. The board had before it the details of those balance sheets, but they are not before us.

With their appraisal, Coats & Burchard prepared a depreciation sheet that was in petitioner's possession, but that was not offered in evidence before the board on either hearing. The presumption is that it was unfavorable to petitioner. This presumption is strengthened by the fact that the Coats & Burchard figures on one Chicago property show a depreciation of about 25%. All properties, figured on that basis, would show a depreciation much greater than the amount stated by Forward to be his recollection of what the Coats & Burchard depreciation figures showed.

The board gave full consideration to all the evidence, and out of all the conflicting evidence reached a conclusion as to the 1913 market value that must be sustained.

For the purpose of arriving at the taxable value of the plant equipment it was agreed that equipment classed as "power" should be depreciated 5%, and that classed as "machinery and tools" 10%.

Petitioner's complaint is that $239,677.35 worth of equipment
183 that should have been classed as "machinery and tools" was
erroneously classed as "power," thereby depriving petitioner
of a 5% depreciation on that amount.

In arriving at a proper depreciation percentage on such a large amount of equipment, located in five different States, it is quite manifest that the useful life of individual items could not be determined. Coats & Burchard, in their appraisal, listed 29 lots. Some of those lots are: Electric-lighting system, $15,624.69; flasks, $35,092.05; furnaces and forges, $130,551.21; miscellaneous, $40,857.79, etc. No detail is before us. Possibly the first item is power. Without further information it is doubtful if anyone could, with a feeling of confidence that he was right, say to which class the other three lots should be assigned. It was necessary, arbitrarily, to make classes into which the items of the equipment could be placed, because many of the items could not be identified as belonging to one class or another, except on the theory that it was entitled to the depreciation fixed for that class. The testimony is unsatisfactory. Forward said, "I include in power the boilers and engines." The witness and respondent got into a controversy over what was power and what was machinery and tools. We have here no information upon which to determine that question. The board gave every opportunity for a full hearing, and was liberal in the admission of evidence. We find no basis for disturbing its finding on the classification for depreciation purposes.

The order is affirmed as to the 1919 taxes, and reversed as to the 1917 and 1918 taxes.

No. 4226. There is in this case no issue on the statute of limitations. Otherwise, the issues are the same as in No. 4225, and are determined by our decision in that case.

The order of the Board of Tax Appeals is affirmed.

184 In United States Circuit Court of Appeals

[Title omitted.]

Petition for review of order of the United States Board of Tax Appeals

4225

CHICAGO RAILWAY EQUIPMENT COMPANY
VS.
COMMISSIONER OF INTERNAL REVENUE

Judgment

March 27, 1930

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the order of redetermination of the United States Board of Tax Appeals entered in this cause on February 21, 1929, be, and the same is hereby, affirmed as to the 1919 taxes and reversed as to the 1917 and 1918 taxes.

It is further ordered that this cause be, and the same is hereby, remanded to the said United States Board of Tax Appeals.

In United States Circuit Court of Appeals

[Title omitted.]

Motion to stay mandate

Filed April 7, 1930

Now comes the Commissioner of Internal Revenue, the respondent herein, by his attorney, C. M. Charest, general counsel, Bureau
185 of Internal Revenue, and moves the court to enter an order herein staying its mandate for a period of three months from the date of the entry of the judgment herein.

In support of this motion the said Commissioner of Internal Revenue respectfully shows to the court that he is considering the advisability of filing in the Supreme Court, within the three months' period provided by statute in that respect, a petition for certiorari in this cause; that it is highly probable that such petition for certiorari will be filed; and that he believes it undesirable under the circumstances to have the mandate of this court issue in accordance with the general rules of this court.

C. M. Charest,
General Counsel, Bureau of Internal Revenue.

[File indorsement omitted.]

In United States Circuit Court of Appeals

[Title omitted.]

Order staying mandate

April 7, 1930

On motion of counsel for respondent, it is now here ordered that the mandate of this court in this cause be, and the same is hereby, stayed until the further order of this court.

186 [Clerk's certificate to foregoing transcript omitted in printing.]

187 In Supreme Court of the United States

Order allowing certiorari

Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 35,153. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 231. Robert H. Lucas, Commissioner of Internal Revenue, petitioner, vs. Chicago Railway Equipment Company. Petition for a writ of certiorari and exhibit thereto. Filed June 27, 1930. File No. 35,153.

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No. 231

In the Supreme Court of the United States

OCTOBER TERM, 1930

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHICAGO RAILWAY EQUIPMENT COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO ADVANCE

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 231

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHICAGO RAILWAY EQUIPMENT COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO ADVANCE

Comes now the petitioner in the above entitled cause, by his counsel, the Solicitor General, and moves that if the writ of certiorari be granted, the case be advanced for argument so that it may be heard immediately following case No. 23, *Charles H. Stange, Petitioner,* v. *United States,* before the Court on writ of certiorari to the Court of Claims, granted March 3, 1930.

Motions of the United States, respondent, are now pending in the Court to advance Case No. 69, *Annette Aiken, Administratrix of the Estate of Friend M. Aiken, deceased, Petitioner,* v. *Robert*

H. Lucas, Commissioner of Internal Revenue, before the Court on writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, granted May 5, 1930, and No. 115, *W. P. Brown & Sons Lumber Company, Petitioner,* v. *Robert H. Lucas, Commissioner of Internal Revenue,* before the Court on writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, granted June 2, 1930, to be heard in their consecutive order immediately after the completion of the argument in the *Stange case.*

The instant case and those three cases present the general question whether a written consent, executed by the taxpayer and the Commissioner of Internal Revenue under the provisions of Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, extending the period of limitations for the assessment and collection of income taxes, is valid when given after the expiration of the period of limitations.

As the present case is more nearly like the *Stange case* than are the other cases, the most orderly presentation can be made to the Court if this case is advanced to be heard between Case No. 23, *Charles H. Stange,* and Case No. 69, *Annette Aiken.* As there are other related questions in the instant case, we submit that the cases should not be consolidated for argument but that it will be convenient for the Court if they are heard consecutively as separate cases in order indicated.

Opposing counsel have been notified of this motion.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

OCTOBER, 1930.

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No. 231

In the Supreme Court of the United States

OCTOBER TERM, 1930

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER
v.
CHICAGO RAILWAY EQUIPMENT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. ——

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL
Revenue, petitioner
v.
CHICAGO RAILWAY EQUIPMENT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of Robert H. Lucas, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above cause on March 27, 1930 (R. 181), reversing in part a decision of the United States Board of Tax Appeals. (R. 163.)

QUESTION PRESENTED

Whether the statutory period of limitation for the assessment of income taxes for 1918 was extended by a waiver executed after such period had expired and after a deficiency notice had been sent to the taxpayer and the taxpayer had filed an appeal with the Board of Tax Appeals.

STATEMENT

Respondent's income tax return for 1918 was filed June 16, 1919, and the five-year period of limitation for assessment and collection fixed by Section 277 (a) (2) of the Revenue Act of 1924 (*infra*, pp. 5–6) expired June 16, 1924. This limitation is qualified by Section 278 (d) of the same Act (*infra*, p. 6), which permits collection of assessments made after June 2, 1924, within six years after the date of assessment. A notice of deficiency in tax for 1918 was mailed to respondent on March 14, 1925, and respondent filed an appeal with the Board of Tax Appeals on May 6, 1925. On December 7, 1925, the Solicitor of Internal Revenue sent respondent a letter in which he stated that "as it is impossible at this time to determine whether the case [before the Board of Tax Appeals] will be disposed of by the Board prior to the expiration of your waiver," a further waiver should be executed, and on December 10, 1925, respondent executed a waiver extending the time for making assessment until December 31, 1926. (R. 153.) The only waiver introduced in evidence before the Board was that of December 10, 1925. On the other hand, no evidence was introduced in contradiction of the reference to a prior waiver contained in the Solicitor's letter. (R. 96–97.)

The Board of Tax Appeals held that the waiver of December 10, 1925, was valid. (R. 161–164.) The Circuit Court of Appeals for the Seventh Circuit held that it was invalid because executed after the expiration of the statute of limitations. (R. 177–178, 181.)

STATUTES INVOLVED

The pertinent statutory provisions are set out in the Appendix.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the waiver of the period of limitation for assessing the 1918 taxes was invalid.

REASONS FOR GRANTING THE WRIT

While the waiver in question covered taxes for both 1917 and 1918, review is sought only as to the 1918 taxes because of the similarity of the question in connection therewith to those involved in *Charles H. Stange* v. *United States,* No. 23, writ of certiorari granted March 3, 1930; *Annette Aiken, Administratrix of the Estate of Friend M. Aiken, Deceased,* v. *Robert H. Lucas, Commissioner of Internal Revenue,* No. 69, writ of certiorari granted May 5, 1930; and *W. P. Brown & Sons Lumber Company* v. *Robert H. Lucas, Commissioner of Internal Revenue,* No. 115, writ of certiorari granted June 2, 1930. Writs of certiorari in those cases were not opposed by the Government. To preserve the rights of the Government pending decision of those cases, the writ should issue in the instant case.

Wherefore, it is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

JUNE, 1930.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300, 301:

> SEC. 277. (a) Except as provided in section 278 * * *—
>
> * * * * *
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.
>
> * * * * *
>
> (b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board. (U. S. C., Title 26, Sec. 1057.)

Sec. 278. (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C., Title 26, Sec. 1060.)

(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made. (U. S. C., Title 26, Sec. 1061.)

Sec. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918 * * * or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277. (U. S. C., Title 26, Sec. 1064.)

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No. 231

In the Supreme Court of the United States

OCTOBER TERM, 1930

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER
v.
CHICAGO RAILWAY EQUIPMENT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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OCTOBER TERM, 1930

No. 231

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

CHICAGO RAILWAY EQUIPMENT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 107) is reported in 13 B. T. A. 471, and the opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 123), reversing in part the determination of the Board, is reported in 39 F. (2d) 378.

JURISDICTION

The decree of the United States Circuit Court of Appeals for the Seventh Circuit was entered March 27, 1930. (R. 127.) The petition for a writ of certiorari was filed June 27, 1930 (R. 128), and was granted on October 13, 1930 (R. 128). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the statutory period of limitation for the assessment of income and profits taxes for 1918 was extended by a waiver executed after such period had expired, and after the Commissioner had determined the taxes and after the taxpayer had filed an appeal with the Board of Tax Appeals.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra,* pp. 13–18.

STATEMENT

Respondent's income and profits tax return for 1918 was filed June 16, 1919 (R. 106), and the five-year period of limitation for assessment and collection fixed by Section 277 (a) (2) of the Revenue Act of 1924 (*infra,* p. 14) expired June 16, 1924. This limitation is qualified by Section 278 (d) of the same Act (*infra,* p. 15), which permits collection of assessments made after June 2, 1924, within six years after the date of assessment. The Commissioner determined a deficiency in taxes for 1918 and on March 14, 1925, mailed a notice of this deficiency to the respondent, who received it in due course. (R. 22.) The respondent filed an appeal with the Board of Tax Appeals on May 6, 1925. (R. 106.) On December 7, 1925, the Solicitor of Internal Revenue sent respondent a letter in which he stated that "as it is impossible at this time to determine whether the case [before the Board of Tax Appeals] will be disposed of by the board prior to the expiration of the period of your waiver," a further waiver should be executed, and on December 10, 1925, respondent executed a waiver extending the time for making assessment. (R. 106, 107.) The only waiver introduced in evidence before the Board was that of December 10, 1925. On the other hand, no evidence was introduced in contradiction of the reference to a prior waiver contained in the Solicitor's letter.

No notice of deficiency was sent after the waiver of December 10, 1925, was executed. That waiver read as follows (R. 106):

> CHICAGO, *December 10, 1925.*
>
> In pursuance of the provisions of existing internal revenue laws, Chicago Railway Equipment Co., a taxpayer of 1928 West 46th Street, Chicago, Ill., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917, 1918, and 1919 under existing revenue acts, or under prior revenue acts.
>
> This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency

> in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said board.
>
> CHICAGO RAILWAY EQUIPMENT CO.
> (Signed) E. T. WALKER,
> *Secretary.*

This waiver was duly executed by the respondent over its corporate seal and was accepted and signed by the Commissioner of Internal Revenue. (R. 107.)

On July 28, 1926, the Board decided the case on its merits. 4 B. T. A. 452. This decision was reversed by the Circuit Court of Appeals for the Seventh Circuit and the case was remanded to the Board for further proceedings. 20 F. (2d) 10. By supplemental petition, the taxpayer then for the first time contended that the assessment and collection of any deficiencies for 1917, 1918, and 1919 were barred by statutes of limitations. (R. 22–23.) On September 24, 1928, the Board decided that none of these taxes was so barred. (R. 107.) 13 B. T. A. 471. On March 27, 1930, the Circuit Court of Appeals affirmed the decision of the Board as to 1919 taxes, but reversed it as to 1917 and 1918 taxes on the ground that the waiver of December

10, 1925, was invalid because executed after the statute of limitations had run. (R. 123.) 39 F. (2d) 378. The case as presented to this Court relates only to the 1918 taxes.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the waiver of the period of limitation for assessing the 1918 taxes was invalid.

SUMMARY OF ARGUMENT

A beneficiary under a statute of limitations may ordinarily waive the benefit after the bar of the statute has intervened. The applicable statute, Section 278 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 300, does not require that a waiver, to be effective, should be executed before the statute has run.

The instant waiver should be construed to apply to and validate the determination of deficiency made before the waiver was executed.

If the waiver is valid and applicable, it operates to extend the time for assessment of the tax until after the decision of this case by this Court. Collection may be made at any time within six years after the assessment.

ARGUMENT

I

The five-year period for assessment of the 1918 tax, fixed by Section 277 (a) (3) of the Revenue Act of 1926, as well as by Section 277 (a) (2) of the

Revenue Act of 1924 (*infra*, p. 14), expired June 16, 1924. On March 14, 1925, the Commissioner determined that an additional amount should be assessed, and mailed the respondent a notice of deficiency. On December 10, 1925, the taxpayer and the Commissioner executed a waiver of the time for making assessment of the tax for 1918 (*supra*, pp. 3–4). This waiver by its terms was to remain in effect at least until December 31, 1926, and longer in certain events.

We maintain that the time for assessment will not expire until after the final decision of this case, because the petitioner on May 6, 1925, had filed an appeal from that determination with the Board of Tax Appeals and because the waiver provides that if an appeal is filed with the Board the time for making assessment shall be extended until the final decision of the Board.

The Circuit Court of Appeals held that the waiver was invalid because executed after the statutory period governing assessment had expired. (R. 124.) The court cited in support of this proposition its own decision in *Pictorial Printing Co.* v. *Commissioner*, 38 F. (2d) 563, but did not discuss the matter. Neither in the case cited nor in the instant case did the court rely upon any language in any statute.

We submit that, unless the language of a statute expressly provides otherwise, a waiver of assessment executed after the expiration of the period for assessment is valid. The argument of the Government on this point is fully presented on pages 6 to 14 of its revised brief in *Stange* v. *United States*, No. 23, current term.

We also submit that no applicable statute invalidates waivers given after the period for assessment has expired. As the determination of deficiency in this case was made after the passage of the Revenue Act of 1924 (which was approved on June 2, 1924), the assessment of the taxes is subject to the provisions of that Act, by virtue of the express language of Section 280 of that Act (*infra*, pp. 15–16). Although Section 277 (a) (2) of that Act (*infra*, p. 14) stipulates that the tax for 1918 shall be assessed within five years after the return was filed, that stipulation is subject to the provisions of Section 278, subdivision (c) of which reads:

> Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

This section does not expressly provide that the consent must be given prior to the expiration of the statutory period for assessment, and we submit that it is not reasonably susceptible of that interpretation.

An examination of the provisions of other Revenue Acts in regard to waivers supports this contention. The only provision in regard to waivers contained in any earlier Act was that in Section

250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, which provided that the tax should be determined and assessed within five years after the return was filed, "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax." The Reports of the Committees of both the House and the Senate which passed the Revenue Act of 1924, under the heading "Section 278 (c)" said merely, "A substantially similar provision is included in section 250 (d) of the existing law." (68th Congress, 1st Session, House Report No. 179, p. 26; Senate Report No. 398, p. 32.)

It is significant that the language of Section 278 (c) of the Revenue Act of 1924 is materially different from Section 506 (a) of the Revenue Act of 1928 which provides in part:

> Where *before the expiration of the time prescribed in section 277 for the assessment of the tax*, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. [Italics ours.]

There is nothing in the legislative history of the later Act which throws any light upon the view which Congress took of the earlier Act [1] when passing the later statute. Consequently, it seems fair to assume that the explicit language of Section 506 (a) was intended to effect a change. Further support for this contention is found in the fact that Section 506 (c) provides that "The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed." See also Section 506 (b), p. 18, *infra.* But see *Joy Floral Co.* v. *Commissioner,* 29 F. (2d) 865 (Ct. App. D. C.).

---

[1] The exact language of Section 278 (c) of the Revenue Act of 1924 was reenacted in Section 278 (c) of the Revenue Act of 1926.

Conceivably, it may be argued that the language of Section 278 (e) refers only to waivers executed prior to the date of the passage of that Act, which was June 2, 1924. That this is not the proper construction of the language is made certain by Section 281 (e) of this Act, relating to credits and refunds, which expressly refers to waivers of assessment filed on or before June 15, 1924 (*infra,* p. 16). See also Section 284 (g) of the 1926 Act.

We submit that Section 278 (e) refers to all waivers executed prior to the making of the assessment, at least

II

The taxpayer has contended that the waiver of December 10, 1925, can not refer to a determination of a deficiency already made and to an appeal already taken to the Board. The waiver consented that an assessment be made after the time fixed by statute. This assessment has not yet been made.

The determination made before the waiver was executed is not final until after the decision of the Board becomes final. We submit that the waiver must have been intended to refer to the deficiency already determined, and that its language is broad enough to include that deficiency. As appears from an inspection of the document itself, the waiver was on the standard mimeographed form regularly used, and this explains the fact that its language is not peculiarly adapted to the situation in the instant case.[2]

The situation is similar to that discussed by the Board of Tax Appeals in *Aiken* v. *Commissioner,* 10 B. T. A. 553, in which the Board said (pp. 561–562):

> Although at the date the assessments were made all remedies were barred, the liability was still in existence. Under these circumstances, petitioner and respondent agreed to "waive the time prescribed by law for making any assessment" and that such period should continue until December 31, 1926, with further provisions relative to notice of deficiency and appeal to the Board. It is clear that these agreements would have validated any assessments made after their effective date and prior to the expiration of the agreed period, and we perceive no reason why they did not give equal validity to the

---

[2] The printed record does not give a complete copy of the waiver. It was introduced in evidence before the Board as Petitioner's Exhibit 3. (R. 72.) The original, so marked, has been filed with the Clerk of this Court.

> assessments which were then in existence. The liability for the taxes remained and they could have been reassessed. This would have been a duplication of what had been done and obviously a work of supererogation. All that was necessary to revive the remedies was an agreement made pursuant to Section 278 (c). Such an agreement was executed and since the effect of the agreement was to revive the remedies, it follows that the prior assessments, although dormant, were revived and made effective by the agreements.

It must be assumed that the notice of deficiency was sent by registered mail. The record shows merely that it was mailed to the taxpayer on March 14, 1925 (R. 106), and that it was received by the taxpayer (R. 22). In the absence of a distinct finding to the contrary, it must be presumed that the Commissioner acted in accordance with the statutory provision requiring all notices of deficiency to be sent by registered mail (Revenue Act of 1924, Sec. 274 (a), *infra*, p. 13).

III

The only remaining question is whether it is still open to the Government to assess and collect the tax.

The respondent on May 6, 1925, filed an appeal with the Board of Tax Appeals. The waiver (*supra*, pp. 3–4), as we construe it, provides that the time for making assessment, in the events which have happened, shall not expire until "the date of final decision" of the Board. That decision will not become final until thirty days after the issuance of the mandate of this Court, under the provisions of Section 1005 (a) of the Revenue Act of 1926 (*infra*, p. 16). The result is that the bar has not yet fallen upon the assessment. Since the assessment is not yet barred, collection may be made under Section 278 (d) of the Revenue Act of 1926, as amended by Section 506 (a) of the Revenue Act of 1928 (*infra*, p. 17), within six years after the assessment. *Cf. Florsheim Bros. Co.* v. *United States*, 280 U. S. 453.

CONCLUSION

It is respectfully submitted that the decision of the court below holding that the statute of limitations had barred the assessment of the 1918 taxes is erroneous and should be reversed, with directions to that court to affirm the order of the Board with regard to the 1918 taxes.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
JOSEPH H. SHEPPARD,
BRADLEY B. GILMAN,
Attorneys.

NOVEMBER, 1930.

APPENDIX

STATUTES INVOLVED

Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, provides in part:

> The amount of income, excess-profits, or war-profits taxes due * * * under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; * * *

Section 274 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 297, provides in part:

> (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.
>
> (b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed

> as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired. [U. S. C., Title 26, Secs. 1048–1049.]

Sections 277 and 278 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300, 301, provide in part:

> SEC. 277. (a) Except as provided in section 278 * * *—
>
> * * * * *
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.
>
> * * * * *
>
> (b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed, then by the number of days between the date of the mailing of such

> notice and the date of the final decision by the Board. [U. S. C. Title 26, Sec. 1057.]
>
> * * * * *
>
> SEC. 278. * * *
>
> * * * * *
>
> (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. [U. S. C., Title 26, Sec. 1060.]
>
> (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made. [U. S. C., Title 26, Sec. 1061.]

Section 280 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 301, provides:

> If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall

> be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277. [U. S. C., Title 26, Sec. 1064.]

Section 281 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 302, provides in part:

> SEC. 281. * * *
>
> * * * * *
>
> (e) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. [U. S. C., Title 26, Sec. 1066.]

Section 1005 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 110, provides in part:

> SEC. 1005. (a) The decision of the Board shall become final—
>
> * * * * *
>
> (4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

> (b) If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected. [U. S. C. App., Title 26, Sec. 1228.]

Section 506 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 870, provides in part:

> *Sec. 506. Waivers after expiration of period of limitation.*—(**a**) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:
>
> "(c) Where before the expiration of the time prescribed in section 277 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."
>
> "(d) Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun

(1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

(**b**) Section 278 of the Revenue Act of 1926 is further amended by adding at the end thereof a new subdivision to read as follows:

"(f) Any agreement which would be within the provisions of subdivision (c) or (d) of this section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective according to its terms if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929."

(**c**) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed. [U. S. C. Sup. III, Title 26, Sec. 2506.].

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No. 231

In the Supreme Court of the United States

OCTOBER TERM, 1930

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER
v.
CHICAGO RAILWAY EQUIPMENT COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONER

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 231

DAVID BURNET, COMMISSIONER OF INTERNAL Revenue, petitioner

v.

CHICAGO RAILWAY EQUIPMENT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

On pages 8 and 9 of the petitioner's brief it is contended by the Government that Section 506 (a) of the Revenue Act of 1928 in limiting the effect of waivers filed after the expiration of the period for assessment was intended to change the situation from that under prior Revenue Acts. The statement was made (at page 8):

> There is nothing in the legislative history of the later Act [Revenue Act of 1928] which throws any light upon the view which Congress took of the earlier Act when passing the later statute.

> This statement is incorrect. The legislative history of the Revenue Act of 1928 indicates that Congress did intend to change the statutory provisions concerning the validity of waivers filed after the expiration of the statutory period for assessment and collection. It was the belief of the House Committee on Ways and Means that waivers filed after the statutory period for assessment or collection had run were valid if filed prior to the 1926 Act.

The report of the House Committee on Ways and Means on the Revenue Act of 1928 (70th Congress, 1st Session, House Report, No. 2, page 29) states:

> SEC. 506. WAIVERS AFTER EXPIRATION OF STATUTE OF LIMITATIONS.
>
> Section 276 (b) of the new bill, incorporates a provision making it clear that the Commissioner and the taxpayer may consent, after the statute of limitations has run, to an assessment or collection of the tax within the period specified. Many instances arise where it is highly desirable to remove the bar of the statute of limitations.
>
> Section 506 of the new bill amends section 278 (c) and (d) of the 1926 Act, in order to apply this policy to taxes under the 1926 and prior acts. *Waivers filed prior to the 1926 Act are undoubtedly valid and have been so held by the Board of Tax Appeals.* However, on account of section 1106 (a) of the 1926 Act, some question has arisen as to the validity of a waiver filed after the expiration of the period of limitations and

> after the enactment of the 1926 Act. The proposed amendment removes this doubt, at least as to waivers filed after the amendment takes effect, by specifically making them valid. (Italics ours.)

On pages 12–14 of the brief for the respondent it is argued that Section 278 (c) of the Revenue Act of 1924, when read in connection with Section 281 (e) of that Act, renders invalid waivers executed after the statutory period for assessment and collection had expired. Section 281 (e) extends the time for making claims for refund if the taxpayer files an assessment waiver on or before a certain date. The respondent incorrectly states that this date is "before the statute of limitations had expired." In fact, Section 281 (e) of the 1924 Act and Section 284 (g) of the 1926 Act, which succeeded it, provide that the date shall be, except as to 1917 taxes, the arbitrary date of June 15, 1924, for 1918 taxes; June 15, 1925, for 1919 taxes; etc. These dates, of course, do not coincide with the expiration of the five-year period from the filing of the return. There is no reason to argue by analogy that the consents authorized in Section 278 (c) must similarly be filed prior to June 15th of the fifth year from the date of the return. Section 278 (c) does not specify any date before which the waivers must be filed in order to be valid.

Moreover, Sections 281 (e) of the 1924 Act and 284 (g) of the 1926 Act are statutes enacted solely for the benefit of the taxpayers. They enlarge the period within which the taxpayer may file his claim for refund only if he has filed a certain waiver within a limited period. Sections 278 (c) of the Revenue Acts of 1924 and 1926 refer to waivers in general. There was no reason to limit such consents under Section 278 (c) to those filed before the expiration of the statutory period. Prior to the enactment of Section 281 (e) of the Revenue Act of 1924 all claims for refund of taxes were required to be filed within four years from the date the tax was paid. Section 3228, R. S., as amended by Section 1112 of the Revenue Act of 1926. The purpose of Section 281 (e) of the Revenue Act of 1924 and of 284 (g) of the Revenue Act of 1926 was to extend this period approximately fifteen months provided the taxpayer before a specified date filed a waiver of his right to have the taxes due for such taxable year determined and assessed at a later time. This is evident from the fact that under these two sections the consent of the Commissioner was not necessary to validate a waiver filed by the taxpayer for that purpose. It was not within the power of the Commissioner to defeat this remedial legislation by declining to consent to waivers filed. Thus, it is apparent that the waivers referred to in those sections are entirely different in nature from the consents authorized in Section 278 (c) of the Revenue Acts of 1924 and 1926, where the Commissioner and taxpayer must both consent in writing to the extension of the statutory period for assessment. There is no analogy between the sections authorizing the filing of waivers by the taxpayer to extend the period for the filing of claims for refund and the sections authorizing consents in writing to a later assessment of taxes. Any comparison between the two is misleading.

Respectfully submitted.

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Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
CLAUDE R. BRANCH,
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JOSEPH H. SHEPPARD,
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Attorneys.

APPENDIX

STATUTES INVOLVED

Section 278 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 300, provides:

> Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C., Title 26, Sec. 1060.)

Section 281 (e) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 302, provides:

> If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. (U. S. C., Title 26, Sec. 1065.)

Section 278 (c) of the Revenue Act of 1926 is identical with Section 278 (c) of the 1924 Act, *supra*.

Section 284 (g) of the Revenue Act of 1926, ch. 27, 44 Stat. 9, 67, provides in part:

> If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. * * *. (U. S. C. App. Title 26, Sec. 1065.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1930.

NO. 231

ROBERT H. LUCAS, COMMISSIONER
OF INTERNAL REVENUE,
Petitioner,

vs.

CHICAGO RAILWAY EQUIPMENT COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM S. OPPENHEIM,
Solicitor for Respondent.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1930.

ROBERT H. LUCAS, COMMISSIONER
OF INTERNAL REVENUE,
Petitioner,
vs.
CHICAGO RAILWAY EQUIPMENT COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Petitioner correctly states that the income tax return of respondent for 1918 was filed on June 16, 1919, and that the five-year period of limitation for its assessment expired June 16, 1924. A deficiency notice was mailed to respondent on March 14, 1925, some nine months after the taxes were barred, and from the determination of the Commissioner the respondent filed an appeal with the Board of Tax Appeals on May 6, 1925. On December 7, 1925, petitioner's solicitor sent respondent a letter in which he stated:

> "It appears from the records of this office that you have filed an appeal with the United States Board of Tax Appeals protesting the assessment of additional taxes for the years 1917, 1918 and 1919 and as it is impossible at this time to determine whether the case will be dis-

> posed of by the Board prior to the expiration of the period of your waiver, you are requested to execute in duplicate and to return to this office at once the enclosed waiver forms.
>
> If the waiver forms are not executed and returned to this office immediately, the commissioner may find it necessary to make assessment of the proposed deficiency under the provisions of Section 274 (d) of the Revenue Act of 1924. (R. 96.)

To avoid this threatened jeopardy assessment, respondent signed and forwarded to petitioner a waiver in which it is said:

> "This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire," etc.

The record shows that this waiver is not signed by the Commissioner. (R. 97.)

The self-serving declaration of the petitioner's solicitor that a prior waiver had been made by respondent could not refer to a legal waiver in existence at the time the Commissioner mailed his deficiency notice on March 14, 1925. If such a waiver was held by the Commissioner, no further waiver would be required by the provisions of Section 277 (b) of the statute of 1924, by which the period for the assessment of taxes is extended sixty days upon the mailing of deficiency notice, and, if an appeal is filed to the Board of Tax Appeals, until the final decision by the Board.

Before the Board of Tax Appeals the respondent set up the bar of the Statute of Limitations. (R. 34, 36.) Petitioner in his answer made no claim of any waiver other than that of December 10, 1925. (R. 38.)

Commissioner's power to accept waiver.

Section 25 of the Revenue Act of 1921 provided that income taxes for the year 1918 should be determined and assessed within five years after the return was filed "unless both the commissioner and taxpayer consent in writing to a later determination, assessment and collection of the tax."

Sec. 278 (c) of the Revenue Act of 1924 provides:

> "Where both the Commissioner and Taxpayer have consented in writing to the assessment of the tax after the time prescribed in 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.
>
> (e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2)" etc.

The object of a waiver is solely to give the Commissioner ample time within which to make his determination and mail his deficiency notice. It seems quite plain that after the determination is made and notice of deficiency mailed, and appeal taken to the Board of Tax Appeals, the Commissioner is without statutory power to exact, under threat of a jeopardy assessment, or even accept, at the solicitation of the taxpayer, a waiver of taxes already barred.

This view is emphasized by the very language of the waiver, which provides that it is to expire on December 31, 1926, unless in the meantime a notice of the deficiency tax is sent by registered mail and then if no appeal is taken, the time for making of the assessment shall be extended sixty days, or if an appeal is filed, then the date shall be extended until the final decision of the Board. No such deficiency notice was mailed. (R. 97.)

Reasons for denying writ.

1. The Statute of Limitations was set up by respondent in its appeal. The only waiver pleaded or introduced in evidence was that of December 10, 1925.

2. The so-called "waiver" is invalid because not signed by the Commissioner.

3. The Commissioner had no authority to consent in writing to the assessment of the tax, as his determination had already been made and an appeal taken to the Board of Tax Appeals when the waiver was filed with him. Sec. 278(e) of the Revenue Act of 1924 contemplates the making of a waiver before the tax is barred and does not empower the Commissioner to enter into such a writing after the expiration of the time for making the assessment.

4. Assuming the waiver to be valid and to authorize a future assessment, then according to its very terms, the right to make such assessment became barred December 31, 1926, because prior to such date no deficiency letter was mailed to the taxpayer.

5. The questions involved in the *Stange, Aiken* and *Brown cases* now pending in this court are not similar to those involved in this suit. In those cases waivers were filed with the Commissioner prior to the time of his making his determination, and, relying thereon, he did not make his determination until after the period of limitation had expired. Here the waiver was not signed by the taxpayer nor demanded by the Commissioner until eighteen months after the taxes were barred, and many months after he had made his determination and mailed his deficiency notice, and after an appeal had been taken to the Board of Tax Appeals.

We respectfully submit that the petition should be denied.

Respectfully submitted,

William S. Oppenheim,
Solicitor for Respondent.

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IN THE

Supreme Court of the United States

October Term, A. D. 1930

No. 231

DAVID BURNET, *Commissioner of Internal Revenue,*
Petitioner,
vs.
CHICAGO RAILWAY EQUIPMENT COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

W. S. OPPENHEIM,
HENRY W. PRICE,
Counsel for Respondent.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1930

DAVID BURNET, *Commissioner of Internal Revenue,*
Petitioner,
vs.
CHICAGO RAILWAY EQUIPMENT COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

Opinions below.

The opinion of the Board of Tax Appeals is reported in 13 B. T. A. 471, and the opinion of the United States Circuit Court of Appeals for the Seventh Circuit, reversing the decision of the Board, is reported in 39 Fed. (2d) 378.

Jurisdiction.

The order of redetermination of the Board of Tax Appeals was entered February 21, 1929. (Rec. 114.) The judgment of the United States Circuit Court of Appeals for the Seventh Circuit was entered March 27, 1930. (Rec. 127.) The petition for a writ of certiorari was filed June 27, 1930, and was granted on October 13, 1930. (Rec. 128.) The jurisdiction of this court rests on Section 240 (a), as amended, of the Judicial Code (U. S. C. Title 28, Sec. 347 (a).

Statutes involved.

The statutes involved are set out in the appendix.

Statement.

Respondent agrees with the petitioner's statement of the case, save that the petitioner has failed to state that in the letter of the Solicitor of Internal Revenue sent respondent on December 7, 1925, these significant words are found:

> "If the waiver forms are not executed and returned to this office immediately, the Commissioner may find it necessary to make assessment of the proposed deficiency under the provisions of Section 274 (d) of the revenue act of 1924." (Rec. 72.)

It was under this implied threat that the respondent was induced to forward the waiver of December 10, 1925.

Summary of Argument.

1. Under the express terms of the waiver, the right to make assessment thereunder expired on December 31, 1926.

2. The language of Section 278 (c) of the Revenue Act of 1924, standing alone, under any reasonable construction limits the power of the Commissioner to sign a waiver to instances where the Statute of Limitations has not expired. In addition to other considerations, this view is supported by the language "where both the Commissioner and the taxpayer *have consented.*"

3. Section 278 (e) of the Act deprives the Commissioner of the right to sign such a waiver as to taxes barred when the Act was passed. It would be absurd, in the view of such a provision, to so construe Section 278 (c) as to empower the Commissioner to execute such a waiver after the statute had subsequently run.

4. Considering Section 278 (c) in *pari materia* with other provisions of the 1924 Act and of the 1926 Act, a con-

struction which permits the Commissioner to sign after the statute has run, results in several absurd and inequitable distinctions. Such a construction will not be adopted if it can be avoided.

Examples of absurdities and inconsistencies resulting from the Commissioner's construction are:

> (*a*) The Commissioner may sign such a waiver after the statute has run as to 1918 taxes if the return was filed June 3, 1919, but not if the return was filed June 1, 1919.
>
> (*b*) After February 26, 1926 (the passage of the 1926 Act), the Commissioner could not sign a waiver as to any taxes for 1919 or prior years which were then outlawed, but if between June 2, 1924 (the passage of the 1924 Act) and February 26, 1926, the Commissioner had signed such a waiver as to outlawed 1919 taxes and as to 1918 taxes that became outlawed after June 2, 1924, then as to such 1919 and 1918 taxes, and *as to those only*, such a waiver, executed *only between those dates*, was good.
>
> (*c*) The refund extension provisions of Section 281 of the 1924 Act as amended on March 3, 1925 would apply in favor of a 1918 taxpayer who executed a waiver before the tax was outlawed, but against a taxpayer for the same year who signed the waiver after the tax was outlawed.

5. After the Commissioner has made his determination and an appeal has been taken to the Board of Tax Appeals and after the statute has run, the Commissioner has not authority to sign a waiver. His function thereafter is merely to assess as directed by the Board.

6. The waiver was obtained from the taxpayer under duress—under a threat of a jeopardy assessment which the Commissioner had the power to make, although he had no right to do so.

ARGUMENT.

I.

By the terms of the waiver, the right to make the assessment expired December 31, 1926.

It is hardly necessary to state that the waiver having been drawn by the Commissioner must be construed most strongly against him. It is therein stated:

> "This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals, then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said board." (Rec. 73.)

As stated by the petitioner's counsel, this waiver appears to be on the standard mimeograph form regularly used by the Commissioner. The form, unquestionably, was prepared with reference to waivers which would be made before the Commissioner had made his determination and before an appeal was taken to the Board of Tax Appeals. Therefore the latter part of this waiver referring to the sending out of a deficiency notice and the taking of an appeal to the Board of Tax Appeals must be considered as having no proper reference to the conditions confronting the parties. It is undenied that no notice of deficiency was sent and appeal taken after the execution of this waiver of December 10, 1925. (Rec. 73.) Such action had been taken months before the waiver had been requested by the Commissioner. The only term, then, of the waiver which can be effective is that the Commissioner may make an assessment against the taxpayer at any time prior to December 31, 1926, but as stated in the waiver, his right to do so "*shall then expire.*" It cannot be justifiably contended that this waiver can be extended beyond its terms. There is no statute of which we are aware which attempts to do such a thing and it certainly would be in violation of the intention of the parties to extend the time for the making of this assessment to the time when it is expressly agreed that it should not be made.

If any authority is needed on the proposition that the right given by the waiver expires at the time stated therein, it is found in the decision of this court in *Florsheim Bros. Dry Goods Co. v. United States*, 280 U. S. 453, 466, where it is stated:

> "At the time when the waivers were executed, the Commissioner was without power under the statute to assess or collect the taxes *after the statutory period as extended by the waivers.*" (Italics ours.)

Such also was the holding of the Board of Tax Appeals in *Aiken v. Commissioner*, 10 B. T. A. 553, 561-562. In the quotation from this case appearing in petitioner's brief this language is used:

> "It is clear that these agreements would have validated any assessment made after their effective date and prior to the expiration of the agreed period."

Without conceding the applicability of that decision to the point in support of which it is cited, it is clear that whether the decision is applicable or not, its effect is that the waiver loses its force upon the date fixed therein.

II.

Under the Act of 1924, the Commissioner is without authority to sign a waiver after the Statute of Limitations has run.

Counsel for the Commissioner, in their discussion of this question, have referred the Court to a portion of their revised brief in *Stange v. United States.* On our own part we ask that the briefs filed on behalf of the taxpayer and by the *amicus curiae* in that case shall be considered in arriving at a decision in this case so far as the same are applicable. We refer particularly to pages 19 to 29 of the original brief filed on behalf of the petitioner and pages 13 to 18 of the brief of the *amicus curiae.*

We apprehend that every argument upon the point under discussion, available to the taxpayer in that case is available to the respondent here, but there are other considerations clearly applicable to this case, some of which we believe are also applicable in the *Stange* case, but as to others of which the applicability is not so clear. The *Stange* case arose under the Revenue Act of 1921 in connection with the taxes for 1914. The instant case arises under the Revenue Act of 1924 in connection with the taxes of 1918.

In the Act of 1924 the authority of the Commissioner to sign a waiver is found in Section 278 (c) which is as follows:

> "Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

Under this provision it is clear, and we believe it is not disputed, that the Commissioner must join in the waiver and his only authority for so joining is to be found in this provision.

Does this subsection (c) authorize the Commissioner to sign such a waiver after the statute has run? We cannot better answer this question than by quoting the language used by the Court of Appeals of the District of Columbia in the case of *Joy Floral Co.* v. *Commissioner*, 29 Fed. (2d) 865. This case arose under the 1924 Act and involved the taxes for the year 1919 and the question before the Court was whether a waiver executed after the statute had run was a valid waiver. The Court say:

> "Furthermore, section 278 (c) *supra*, provides that the written consent for a later assessment shall not be operative unless signed by the Commissioner as well as by the taxpayer. This provision plainly contemplates that the consent shall be executed at a time when the Commissioner still possesses the authority to make an assessment and when he may refuse to consent to any delay in making it. For it does not seem that the Commissioner's consent would be deemed important after he has been barred by statutory limitations from making any assessment. This view is favored also by the grammatical construction of the words of sections 277 and 278 when construed together. The first section provides that the assessment shall be made within five years after the filing of the return. The second section provides that if 'the Commissioner and the taxpayer have consented in writing' to a later assessment the tax may be assessed at any time within the period agreed upon. The phrase 'have consented,' as thus employed, fairly implies that a completed consent shall have been given before the expiration of the period first provided for. It may be added that this limitation is designed to provide for the orderly administration of the government's finances as well as for the protection of the taxpayer. Such a purpose would not be subserved if the Commissioner and the taxpayer could afterwards agree to the making of an assessment utterly regardless of any time limitation."

This decision was followed by the Circuit Court of Appeals for the Seventh Circuit in *Pictorial Printing Co.* v. *Commissioner*, 38 Fed. (2d) 563. In their brief in the *Stange* case, counsel for the Commissioner comment on this decision as follows (p. 13): "With little discussion it also apparently applied the reasoning of the court in the *Joy Floral* case to the provisions of Section 250 (d) of the Act of 1921."

From the decision itself it is perfectly clear that whatever opinion may be held as to the brevity of discussion, the Court gave the question very careful consideration, referring among others to the decision of the Court of Claims in the *Stange* case itself. The language of the decision in this connection is as follows:

> "But, apart from this, there is the question whether, in general, a statutory consent for determination of a tax, entered into after expiration of the period of limitation, upon proceedings for redetermination, assessment, or collection, has any validity. The Board of Tax Appeals held in its opinion in this case that such a consent was binding upon the taxpayer, and that a deficiency found thereunder was valid and collectible. Among others of the Board's opinions there was cited in support *Joy Floral Company*, 7 B. T. A. 800. It appears that upon review of that case by the Court of Appeals of the District of Columbia, that court reversed the decision of the Board, and held that such consent for extension was not effective if entered into after the period of limitation had expired. *Joy Floral Co.* v. *Commissioner*, 29 F. (2d) 865. This decision was followed in *Spears & Co.* v. *Heiner, Collector*, D. C. Pa. 34 F. (2d) 795; and by the District Court for the Middle District of Tennessee in *Columbia Iron Works* v. *Brook, Collector*, September 28, 1929. But in a more recent case, in the U. S. Court of Claims, *Stange* v. *United States*, November 4, 1929, a decision was reached in conformity with the views of the Board of Tax Appeals in its Joy Floral Co. decision.
>
> For the reasons stated in the said opinion of the Court of Appeals of the District of Columbia, and in the above cited cases in which it was followed, we are of opinion that the correct rule was there announced, and that the Commissioner takes nothing by a consent first entered into after the limitation had expired."

In the instant case, decided at the same term as the *Pictorial Printing Company* case, the Court merely referred upon this point to its decision in the last named case.

The reasoning of these opinions is upheld by other considerations. In our effort to apply Section 278 (c) to the facts now presented, we are apt to overlook its real purpose and intended application. The entire Section 278 is making provision in regard to the taxes of 1924 and future years. It also has in contemplation that lesser but still enormous amount of taxes not yet assessed for prior years and which are not yet barred. As to those taxes, when the words "have consented" are used, they are so used in the future tense. More accurately, they mean "shall have consented." Does that expression mean "shall have consented" before the statute has expired, or does it mean "shall have consented" before the assessment is made?

We must remember that by Section 271 of the 1924 Act it is provided that "as soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax." Considering this duty of the Commissioner in connection with the establishment of the statute of limitations and the progressive shortening of that statute in the various acts, it is clear that the intent of Congress is both to spur the Commissioner to activity and to afford increasing protection to the taxpayer. It would in a measure thwart this very clear purpose to permit the Commissioner to make these waivers after the statute had run.

We have these considerations, therefore, in addition to the sound reasoning of the court in the *Joy Floral Company* case, to support our contention that "have consented" as used in Section 278 (c) requires that the consent must be given before the statute is barred. To our thinking, such a construction must be adopted unless positive provisions to the contrary are found elsewhere in the law.

But what do we find? We find support for our own construction in Section 278 itself, and by comparison with other sections of the 1924 Act and with the Acts of 1926 and 1928 we find like support, and learn that to adopt the construction of the Commissioner will lead into absurdities and inequalities that, surely, can never have been intended.

Before referring in detail to the statutory provisions just mentioned, we think it well to refer in passing to the rule of construction already called to the attention of the Court in various briefs in the *Stange* case. That rule is that taxation statutes including provisions for limitation are to be construed most favorably in favor of the taxpayer. We quote again from the decision in *United States* v. *Updike*, 281 U. S. 489, where the Court say (p. 496):

> "In any event, we think this is the fair interpretation of the clause and the one which must be accepted, especially in view of the rule which requires taxing acts including provisions of limitations embodied therein to be construed liberally in favor of the taxpayer. *Bowers* v. *New York & A. Lighterage Co.*, 273 U. S. 346, 349."

Effect of Section 278 (e) Revenue Act of 1924.

Passing to a consideration of other statutory provisions lending aid in the construction of Section 278 (c), we first call attention to Section 278 (e). This subsection is in part as follows:

> "This section (*i. e., entire Section 278*) shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence," etc.

This subsection (e) of course makes subsection (c) inapplicable to any taxes that are already barred. In other words, the Commissioner has no authority subsequent to the passage of this Act, to sign a waiver in regard to taxes barred at the time of its enactment. See *In re* Jacobs Bros. Co., 19 B. T. A. 315. It is undoubtedly on this account that the Commissioner has abandoned his effort to collect the 1917 taxes, although those taxes were involved in the proceedings below and were mentioned in the very waiver now under discussion.

Is it to be supposed that Congress thus depriving the Commissioner of the authority to consent to taxes already barred, still contemplated, that in the future as to taxes which might subsequently become barred, the Commissioner should have such power? In the absence of words affirmatively compelling such a construction, are we not obliged to construe Section 278 (c) as requiring that the assessment must be made before the bar has attached? As an illustration of one absurdity resulting from the construction contended for by the Commissioner, it is perfectly clear that if a taxpayer for 1918 filed his return on June 1, 1919, then as to him the Commissioner was deprived of power by the 1924 Act thereafter to sign a waiver; whereas as to another taxpayer who filed his 1918 return on June 3, 1919, the Commissioner had such power. We can conceive of no ground of distinction between these two taxpayers and yet the Commissioner adopts a theory leading to this absurd distinction.

Effect of Section 278(e) Revenue Act of 1926.

Again, comparing the later Act of 1926, approved February 26, 1926, we find that Section 278(e) of that Act substantially follows the language of the same numbered section of the 1924 Act by providing that "This section shall not * * * authorize the assessment of a tax * * * (1) if at the time of the enactment of this act such assessment * * * was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this act, the Commissioner and the taxpayer agreed in writing thereto." Here again, as in the case of the 1924 Act, the Commissioner is deprived of his power to sign the written consent where "the period of limitation" has run. We do not understand that 278(e) of the 1926 Act is in this regard any different from the same section as found in the 1924 Act. It merely defines with greater particularity what is meant by the words "period of limitation" as used in the 1924 Act.

Now considering these two acts together, the necessary result from the Commissioner's construction of Section 278(e) is this: No consent may be given by the Commissioner after June 2, 1924, to a tax that was outlawed on that date. No such consent may be given after February 26, 1926, to a tax that was outlawed on that date, but between the two dates mentioned, the Commissioner may give his consent after the statute has run, as to those taxes that become barred in the time elapsing between the said dates. The taxes for 1917 were barred on June 2, 1924. The taxes for 1920 and subsequent years were not barred on February 26, 1926. Thus the two acts taken together would single out the taxes for 1919 and those taxes for 1918 where the return was filed subsequent to June 1, 1919, as the only taxes to which the Commissioner could give his consent after the statute had run. And such consent must have been given between the two dates mentioned. Again we ask what reason can be advanced for such discrimination?

Effect of Section 281(e) of the Revenue Act of 1924, as amended.

There is still another Section of the 1924 Act which affords light upon this question. Section 281(e) of the 1924 Act, as amended on March 3, 1925, contains the following provision:

> "If the taxpayer has within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund, relating to the taxes for the year in respect of which the waiver was filed, shall be allowed or made, if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid.* If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund, relating to the taxes for the taxable year 1919, shall be allowed or made, if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If any such waiver, so filed, has before

> the expiration of the period thereof been extended, either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund, relating to the taxes for the year in respect of which the waiver was filed, shall be allowed or made, if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919."

The portion of the above quoted language, following the * was added by the amendment of March 13, 1925.

The clear effect of this subsection (e) was to extend the time for making claims for refund, if, before the statute of limitations had expired, the taxpayer had filed a waiver of his right to have the taxes determined and assessed within the limitation period, and such is the meaning ascribed to the original statute by Article 1307 of Regulations 65, relating to the Act of 1924. One of two consequences, therefore, necessarily follows from the provisions of Section 281(e). Either (1) Congress contemplated that the waiver provided for by Section 278(c) should be executed before the statute had run, or (2) it discriminated in favor of taxpayers who signed such waivers before the statute had run and against those who filed such waivers after the statute had run. It would appear that the taxpayer who waived the bar of the statute, which had already run, and against whom the Commissioner could not proceed, would be entitled to more consideration, if anything, than a taxpayer still subject to the action of the Commissioner. Yet, precisely the contrary is the result of this legislation if the Commissioner's view of Section 278(c) is adopted. Again we say, that no construction should be adopted which will lead to such an unreasonable result.

To sum up our discussion upon this point, we submit that Section 278(c), standing alone, and in view of its evident purpose, permits the Commissioner to sign a waiver only before the taxes are barred by the Statute of Limitations; that to give the language of that section any other meaning would require clear and explicit language in other sections of the Act; that far from finding any such explicit directions, we find provisions which can only be harmonized with Section 278(c) by adopting the view which we are claiming; that if there is any ambiguity in the provision it must be resolved in favor of the taxpayer.

III.

The Commissioner has no power to sign a waiver after an appeal to the Board of Tax Appeals and after the statute has run.

Section 274(a) of the 1924 Act provides that when a deficiency letter is sent, the "deficiency shall be assessed only as hereinafter provided." Section 274(b) provides "if the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the Collector." Section 900(h) requires the Board to give both the taxpayer and the Commissioner an opportunity to be heard.

Thus, after the appeal to the Board, the powers of the Commissioner are greatly changed. Thereafter, until the decision of the Board, the Commissioner and the taxpayer are in the position of litigants. The assessment which the Commissioner must make after the decision of the Board is a mere ministerial act in compliance with the orders of the Board. It is not the result of a finding made by himself, pursuant to the law, as in the case of the original assessment or deficiency assessment.

It is entirely clear that the purpose of these waivers is to give the Commissioner the opportunity to investigate the facts and determine and assess the tax. This was indicated by the very language of the waivers originally used, as is indicated, for instance, by the waiver quoted at pages 3 and 4 of the Government's brief in the *Stange* case. That such is the purpose of the waiver was stated in *Loewer Realty Company* v. *Anderson*, (2d C. C. A.), 31 Fed. (2d) 268, where the Court say:

> "The plain purpose of Section 278 of the Act of 1926, as that of Section 278 of the Act of 1924 and Section 250 (d) of the Act of 1921, was to give the Commissioner additional time to assess taxes if he could obtain the consent of the taxpayer."

But after the Commisioner has exhausted his powers of investigation and has made his determination, after an appeal has been taken and the statute has run, the making of the waiver has no office to perform such as was contemplated by Section 278(c).

To give to the waiver the construction contended for by the Commissioner is to convert it into an agreement that in the case then and still pending the taxpayer would not interpose the defense of the Statute of Limitations. It is not susceptible of such an interpretation. Even if it could be so interpreted, the Commissioner was without power to make it.

Giving it the utmost construction possible, the assessment to which it refers must be the assessment made as a ministerial act, pursuant to the decision of the Board. It cannot be enlarged into an agreement to give up the right the taxpayer then unquestionably possessed, and still possesses, to interpose the bar of the statute in the pending proceeding.

The decision of the Board of Tax Appeals in *Aiken* v. *Commissioner*, 10 B. T. A. 553 is not in point. The waiver referred to in the quoted language was given *before* the appeal was taken to the Board of Tax Appeals. Also, as appears from the decision in that case on appeal, 35 Fed. (2d) 620, the assessment was actually made before the statute, as extended by prior waivers, had expired. The Board of Tax Appeals was, it is true, considering the effect of a waiver given after an assessment, and was assuming, for the sake of the argument, that the assessment was made after the statute had run. Its reasoning that in defiance of the plain language of the waiver, the parties did not actually intend that such a new assessment should be made, is, we submit entirely untenable. No authorities were cited by the Board in support of such a startling proposition and we do not believe any such can be found. The precise point discussed in the citation was not referred to in the decision by the Circuit Court of Appeals.

IV.

The threat to make a jeopardy assessment.

Why did the respondent sign this waiver at the time when, and under the circumstances in which, it was given?

The answer is found in the letter of the Commissioner's solicitor, enclosing the waiver forms, and saying that if they were not executed and returned immediately "the Commissioner may find it necessary to make assessment of the proposed deficiency under the provisions of Section 274(d) of the Revenue Act of 1924." In other words, the Commissioner threatened to make a jeopardy assessment unless the waiver was signed. The Commissioner had no right to make a jeopardy assessment after the statute had run, but he had the power to do so.

We submit, that a waiver procured from the taxpayer by such a threat is invalid. Certainly, a waiver signed under such circumstances, is not to be construed any more favorably than its exact language requires; it is not to be construed as an agreement on the part of the taxpayer to give up any defense, including that of the Statute of Limitations, which it may possess as to the then pending proceeding.

IN CONCLUSION.

The five years provided for the assessment of the tax expired June 16, 1924. Nearly nine months thereafter, and on March 14, 1925, the Commissioner made his determination of deficiency and mailed notice thereof to respondent. Thereafter, on May 6, 1925, respondent appealed to the Board of Tax Appeals. Thus the determination and the appeal took place after the statute had run. The Commissioner depends altogether upon the waiver executed on December 10, 1925, for his right to make an assessment after the decision by the Board of Tax Appeals, but this waiver, by its own terms, expired on December 31, 1926.

The decision of the lower court should be affirmed, *first*, because the waiver by its own terms expired nearly four years ago; *second*, because the waiver was given after the statute had run; *third*, because it was given after the appeal to the Board of Tax Appeals; and, *fourth*, because it was procured by the threat of a jeopardy assessment which the Commissioner had no authority to make.

Respectfully submitted,

W. S. Oppenheim,
Henry W. Price,
Counsel for Respondent.

APPENDIX.

Statutes involved.

Section 271 of the Revenue Act of 1924, Chap. 234, 43 Stat. 253, 296, is as follows:

> "Sec. 271. As soon as practicable after the return is filed, the Commissioner shall examine it and shall determine the correct amount of the tax."

Section 274 of the Revenue Act of 1924, Chap. 234, 43 Stat. 253, 297, provides in part:

> "Sec. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.
>
> (b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.
>
> (d) If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, such deficiency shall be assessed immediately and notice and demand shall be made by the Collector for the payment thereof. * * *"

Section 277 of the Revenue Act of 1924, Chap. 234, 43 Stat. 253, 299, provides in part:

> "SEC. 277. (a) Except as provided in section 278—
>
> * * * * *
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

Section 278 of the Revenue Act of 1924, Chap. 234, 43 Stat. 253, 299, 300 is as follows:

> "SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.
>
> (b) Any deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234, of the Revenue Act of 1918 or the Revenue Act of 1921, may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment at any time.
>
> (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.
>
> (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.
>
> (e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of

> this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

Section 281 (e) of the Revenue Act of 1924, Chap. 234, 43 Stat. 253, 302, as amended March 3, 1925, Chap. 435, 43 Stat. 1115, 1116 is as follows:

> "If the taxpayer has within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund, relating to the taxes for the year in respect of which the waiver was filed, shall be allowed or made, if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid.* If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund, relating to the taxes for the taxable year 1919, shall be allowed or made, if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If any such waiver, so filed, has before the expiration of the period thereof been extended, either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund, relating to the taxes for the year in respect of which the waiver was filed, shall be allowed or made, if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919."

Section 900 of the Revenue Act of 1924, Chap. 234, 43 Stat. 253, 337, is in part as follows:

> "SEC. 900 (h). Notice and an opportunity to be heard shall be given to the taxpayer and the Commissioner and a decision shall be made as quickly as practicable. * * *"

*** The portion of the above quoted language following the asterisk was added by the amendment of March 13, 1925.**

Section 278 (e) of the Act of 1926, Chap. 27, 44 Stat. 9, 59, is as follows:

> "(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act."

Article 1307, Regulations 65, relating to the income tax under the Revenue Act of 1924 is in part as follows: (p. 233):

> "Where the taxpayer has within five years from the date the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. The effect of this provision is to grant to those taxpayers who, prior to the expiration of the period within which an additional assessment could be made, filed a waiver for the year 1917, an additional period in which to present their claims for refund or credit of the excess amount of the tax paid for the year 1917, with the result that in such cases the claim may be entertained if filed either on or before April 1, 1925, or within four years from the time the tax was paid. An additional period to April 1, 1925, within which the taxpayer may file his claim for the credit or refund of taxes imposed under the Revenue Act of 1918 for the year 1918 is also provided in the event the taxpayer has on or before June 15, 1924, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed."

SUPREME COURT OF THE UNITED STATES.

No. 231.—October Term, 1930.

David Burnet, Commissioner of Internal Revenue, Petitioner, *vs.* Chicago Railway Equipment Co.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 5, 1931.]

Mr. Justice Brandeis delivered the opinion of the Court.

The Revenue Act of June 2, 1924, c. 234, § 278 (c), 43 Stat. 253, 300, provides concerning income and profits taxes under the Revenue Act of 1918: "Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon." Section 277 (a) (2), 43 Stat. 299, provides that the tax "shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period." Section 277 (b) provides that if due notice of the determination of a deficiency has been mailed to the taxpayer, and an appeal is taken to the Board of Tax Appeals, the time for making the assessment shall be extended "by the number of days between the date of mailing of such notice and the date of the final decision by the Board." Section 278 (d) provides that when assessed within the period prescribed by § 277 or § 278, "such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax." This case presents, among others, the question whether a waiver given while the case was pending before the Board of Tax Appeals but after the expiration of five years from the filing of the return tolls the statute of limitations.

On June 16, 1919, the Chicago Railway Equipment Company filed its income and profits tax return for 1918. On March 14, 1925, the Commissioner determined a deficiency and gave due notice thereof. On May 6, 1925, the taxpayer filed its appeal with the Board of Tax Appeals. On December 10, 1925, the taxpayer and the Commissioner executed an agreement which provided that "the time for making any assessment . . . shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and . . . if an appeal is filed with said Board [of Tax Appeals] then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said board." On July 28, 1926, the Board confirmed, in the main, the Commissioner's determination, 4 B. T. A. 452; but the Circuit Court of Appeals remanded the case to it for further procedings. 20 F. (2d) 10. Then, for the first time the defense was made that the deficiency had been barred by the statute of limitations. The Board overruled the objection, 13 B. T. A. 471; but its decision was reversed by the Circuit Court of Appeals, 39 F. (2d) 378. This Court granted a writ of certiorari. 282 U. S. —.

First. The taxpayer contends that the agreement of December 10, 1925, was inoperative because the Commissioner lacked the power to sign a waiver after an appeal from his determination to the Board of Tax Appeals. The argument is that once such an appeal has been filed, the Commissioner's powers of investigation and determination have been exhausted; that thereafter his duty in making an assessment pursuant to the Board's order is purely ministerial; that the waiver is in effect an agreement not to plead the statute of limitations; and that the Commissioner is not authorized to receive such a waiver. As we said in *Stange* v. *United States*, No. 23, decided this day, the Commissioner's signature was required purely for administrative purposes. See *Florsheim Bros. Co.* v. *United States*, 280 U. S. 453, 466. There was nothing in this requirement which limits the period during which a waiver may be effectively given. Compare *Aiken* v. *Commissioner*, No. 69, decided this day. Moreover, at the time this waiver was executed, the Commissioner was contemplating the making of a jeopardy assessment which the taxpayer desired to avoid. The Commissioner was clearly authorized, under his general administrative powers, to accept instead the waiver as a substitute means of insuring ultimate collection. See *Aiken* v. *Commissioner, supra.*

Second. The taxpayer contends that the waiver was inoperative because the Commissioner lacked the power to sign a waiver after the expiration of the five-year period.[1] What was said on this subject in reference to a waiver under the 1921 Act in *Stange* v. *United States, supra,* is applicable also to the corresponding provision of the 1924 Act. A difference in phraseology is called to our attention; but it is without significance. The further argument is made that in view of other sections in the 1924 Act,[2] an interpretation of § 278 (c) which permitted the giving of a waiver after the expiration of the five years, would lead to absurdities and inequalities which Congress could not have intended. Reference is made, first, to § 278 (e)[3] which, it is urged, renders inoperative any waiver signed after the enactment of the statute where the assessment in question was already barred prior thereto.[4] The inequality charged is that the limitation period for the assessment of 1918 taxes due under a return filed before June 2, 1919, could not, under the suggested interpretation, be waived after June 2, 1924, but that the corresponding limitation for the same tax due under a return filed after June 2, 1919 could be so waived. We need not determine whether respondent is correct in assuming that § 278 (e) qualifies § 278 (c) in respect to waivers on assessment of taxes barred prior to June 2, 1924;[5] for even if that section has this effect, no objectionable inequality would result in permitting a revival of liability in one case and not in the other. Some arbitrary date must be taken for the imposition of a period of limitation. It may be taken likewise in regard to its removal.

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[1] See Joy Floral Co. *v.* Commissioner, 29 F. (2d) 865; Columbia Iron Works *v.* Brock, 38 F. (2d) 816. In these cases the taxpayers' contention was sustained and the waivers held inoperative.

[2] Respondent also cites § 278 (e) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 59, which substantially reënacted § 278 (e) of the 1924 Act, and urges that particular discriminations would result from the combined effect, under certain suggested interpretations, of these two sections. But the effect of a later statute cannot authorize an unintended and undesirable construction of an earlier act. Compare Russell *v.* United States, 278 U. S. 181, 188.

[3] "(e) This section shall not (1) authorize the assessment of a tax . . . if at the time of the enactment of this Act such assessment . . . was barred by the period of limitation then in existence. . . ." 43 Stat. 300.

[4] In the case at bar, the assessment would not have been barred until June 16, 1924, five years from the date of the return, and after the enactment of the 1924 Act, so that § 278 (e) is wholly inapplicable. Respondent offers the case of a tax under an earlier return merely for the purposes of its argument.

[5] Subdivision (e) cannot be said to qualify every other subdivision in § 278. Nothing indicates an intention to have it limit the effect of § 278 (a) which permits assessment to be made or suit to be brought at any time in the case of a false or fraudulent return or a failure to file any return. Compare United

Attention is also called to § 281 (e) of the 1924 Act,[6] which extended the time for making claims for refund where a waiver of assessment had been filed prior to certain specified dates,[7] and it is said that § 278 (c), as interpreted, would, when read with § 281 (e), result in a discrimination against those taxpayers who had signed a waiver after the statute had run. The argument is that such taxpayers would still be liable for the tax, but that no corresponding extension of the limitation on claims for refund would be given. The dates specified in § 281 (e), however, do not coincide with the periods of limitation on assessment and collection. The purpose of that section was merely to extend the time for filing claims for refund in particular cases of taxes for the years 1917-1919. There is no necessary relation between it and § 278 (c). Moreover, a tax-

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States *v.* Updike, 281 U. S. 489, 495; United States *v.* Lazenby, 5 F. (2d) 827. Nor is there any indication that it should qualify subsection (c) which provides for the giving of waivers. But see Jacobs Brothers Co. *v.* Commissioner, 19 B. T. A. 315, which involved § 278 (c) and related sections of the 1926 Act, *supra*, note 2. Compare Steiner Mfg. Co. *v.* Commissioner, 18 B. T. A. 740; James & Holmstrom Piano Co. *v.* Commissioner, 19 B. T. A. 322; Gillespie *v.* Commissioner, 20 B. T. A. 1068, 1079; Wetherell Bros. Co. *v.* White, D. Mass., decided December 3, 1930, U. S. Daily, December 30, 1930, p. 3291. The decision in Russell *v.* United States, 278 U. S. 181, involved the interpretation of subdivision (d) which extended the period for collection without any act on the part of the taxpayer. Subdivision (c) is effective only if the taxpayer voluntarily executed a waiver.

[6] 43 Stat. 302, as amended by the Act of March 3, 1925, c. 435, 43 Stat. 1115.

[7] *E. g.*, for 1917 taxes, within five years after the return was filed; for 1918 taxes, before June 15, 1924; for 1919 taxes, before June 15, 1925. Claims might be made on or before April 1, 1925 for 1917 and 1918 taxes, on or before April 1, 1926 for 1919 taxes; or if the waiver was extended by a new waiver, then respectively before April 1, 1926 or April 1, 1927; or within four years after the tax was paid. 43 Stat. 116, 302, 1115-16. See Reg. 65, Art. 1307. These provisions followed a similar section in the Act of March 4, 1923, c. 276, 42 Stat. 1504-05, dealing with 1917 taxes; they were reënacted, to include claims for the refund of 1920 and 1921 taxes, in § 284 (g) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 67. Prior to the enactment of § 281 (e) of the 1924 Act, all claims for refund had to be filed within five years from the date the return was due, or within two years from the date the tax was paid, R. S. § 3228,

payer who has signed a waiver and has had the validity of the alleged deficiency determined in the courts, on appeal from the Board's determination, has no good ground for complaint that he cannot thereafter raise the same question on a claim for refund.[8]

Third. The taxpayer contends that, by its terms, the waiver expired December 31, 1926. The argument is that since the appeal to the Board of Tax Appeals had already been taken, the latter part of the instrument, relating to an extension of the time for assessment equal to the number of days the case would be before the Board, is inapplicable. The immediate object for which the waiver was given was to enable the case to be determined, without respondent being obliged to pay or to furnish bond; and it must have been assumed that thereafter the Commissioner would duly assess and collect the amount of the deficiency. The record reveals that three days before the execution of the waiver, the Solicitor of Internal Revenue wrote respondent that "as it is impossible at this time to determine whether the case will be disposed of by the board prior to the expiration of the period. . . . you are requested to execute . . . the enclosed waiver . . ."; and he stated further that if the waiver were not given, the Commissioner would make a jeopardy assessment and require a bond as a condition of deferring collection. Consequently, the provisions of the latter part of the waiver were clearly intended to be applicable; and while its lan-

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as amended by the Act of March 4, 1923, *supra.* See Revenue Act of 1918, c. 18, § 252, 40 Stat. 1057, 1085; Revenue Act of 1921, c. 136, § 252, 42 Stat. 227, 268; Revenue Act of 1924, c. 234, § 1012, 43 Stat. 253, 342. Compare § 1112 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 115; Minnesota Mutual Life Ins. Co. *v.* United States, 66 Ct. Cls. 481, 493, certiorari denied, 279 U. S. 856; Oxford Bank *v.* United States, 44 F. (2d) 253.

[8] The 1926 Act expressly provided that where an appeal had been taken from a deficiency determination, no credit or refund could thereafter be allowed except in conformance with the decision of the Board. Section 284 (d), c. 27, 44 Stat. 9, 67. And refund or credit was allowable only if the petition had been filed with the Board within four years after the tax was paid, or a timely claim for refund had been made. Section 284 (e), 44 Stat. 67. This section was amended by § 507 of the 1928 Act, c. 852, 45 Stat. 871; 26 U. S. C. § 1065 (e), to make the filing of a claim for refund or credit unnecessary where an appeal was taken. On the general problem of refunds, compare H. Rep. No. 1, 69th Cong., 1st Sess., December 7, 1925, pp. 13-14; Hearings Before the Committee on Ways and Means on Revenue Revision of 1925, *id.*, pp. 285-92, 504, 934, *et seq.*, 981-83; Hearings Before the Senate Committee on Finance, on H. R. 1, *id.*, January 4, 1926, pp. 192-94, 208-09.

guage perhaps was not as apt as it might have been,[9] there is no basis for denying its obvious purpose.

Fourth. The taxpayer contends that the waiver was inoperative because secured by duress. The argument is that while the Commissioner in December, 1925, might have made a jeopardy assessment and have enforced collection, such action would have been illegal because the statutory period had then expired, and that a waiver procured by such a threat is ineffective. Whether or not the Commissioner would have been liable to the taxpayer for a collection made as the result of a jeopardy assessment in 1925, we need not determine. He clearly had the power to make such assessment and thereby compel the filing of a claim for abatement and the giving of a bond,[10] or, if such claim and accompanying bond were not filed, to make collection and relegate respondent to an action at law. In the absence of a determination that this deficiency was barred,[11] it was the Commissioner's duty to proceed to insure the assessment and collection of the tax. At his suggestion, the taxpayer executed the waiver. Thereby it was enabled to have all questions concerning the alleged deficiency considered by the Board. A waiver given under such circumstances is not invalid. This contention, which seems to have been raised for the first time in this Court, is also unsound.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[9] The waiver was executed on the standard mimeographed form generally used prior to the mailing of a deficiency letter. Had it read: " . . . if a notice of deficiency *was* sent . . ." before December 31, 1926, there could be no doubt of its applicability to the appeal then pending. Its meaning, in view of the circumstances under which it was given, is nevertheless clear.

[10] See Revenue Act of 1924, c. 234, § 274 (d) and § 279 (a), 43 Stat. 253, 297, 300.

[11] Other waivers were alleged to be in existence, and while they were not produced at the trial before the Board, it is evident that in December, 1925, the Commissioner was of the opinion that the deficiency, already determined, was not barred. This was clearly stated in the letter to respondent requesting a waiver.